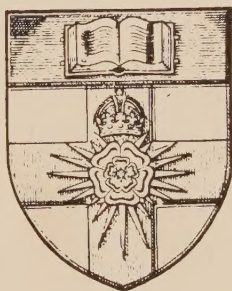


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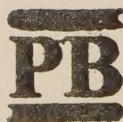
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CORRIGENDA.

Page 295, note (1), for "L. Ir." read "L. R. Ir."

„ 323, line 18, for "40" read "43".

„ 413, note (2), for "410" read "910".

„ 538, line 19, for "1908" read "1898".

Pages 666-680, margins, for "K. B. Div." read "Appeal".

Page 718, line 15, before "of the" read "the judgments".

C A S E S

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1910.

HUGH ROBERT TOPPING, APPELLANT; GEORGE
FOTTRELL AND JAMES KEOGH, RESPONDENTS (1).

Appeal.
1909.

Nov. 12, 15.

*Parliament—Lodger franchise—Column of claim for “amount of rent paid”
filled in “services in lieu of rent.”*

A claimant for the lodger franchise, in stating the particulars of his alleged qualification, inserted in the column headed “Amount of rent paid” the words “Services in lieu of rent.” No evidence was given on behalf of either the claimant or the objector:—

Held, by the Court of Appeal (Palles, C.B., and Holmes, L.J.; Lord O'Brien, L.C.J., dissenting), that the words “services in lieu of rent” disclosed only the relationship of master and servant, and not that of landlord and tenant, and that the claimant was not entitled to the franchise.

APPEAL by Hugh Robert Topping from the decision of an Assistant Revising Barrister for the County of Dublin, North Dublin Division, admitting the claim of James Keogh.

(1) In the Court of Appeal, before LORD O'BRIEN, L.C.J., PALLES, C.B., and HOLMES, L.J.

Appeal.
1909.

TOPPING
v.
KEOGH.

The material portion of the "statement" was as follows:—

"At a Court held by me at Clontarf on the 15th September and following days, the name of James Keogh appeared at No. 49 on the New Lodger List for the Registration Unit of Clontarf, East Ward, Parliamentary Polling District of Clontarf, County of Dublin, Northern Division, as follows:—'Name of claimant—James Keogh. Description of rooms—Back room, furnished. House in which lodgings are situated—16 Seaview Avenue. Amount of rent paid—Services in lieu of rent. Name and address of landlord—Thomas Keogh, 16 Seaview Avenue.' The claim of the said James Keogh was duly signed by him, and was on the form prescribed in the Registration Rules of 1899, and the particulars of the claimant's qualifications were stated as they appear on the said list.

"The name was duly objected to; no evidence was given on the part of the objector in support of his objection; but it was contended by him that the words "services in lieu of rent" disclosed only the relation of master and servant, and that there was no averment of any separate contract for the occupation of the lodgings.

"No evidence was called on behalf of the claimant, and it was contended on his behalf that, as no evidence was given to rebut the declaration of the claimant, the claim should be admitted.

"I was of opinion that payment of rent in money was not essential to the qualification, and that the consideration for the letting of the rooms might take the form of services rendered: *Brown v. Ferguson* (1). I, accordingly, held that the claim was good on its face, and in the absence of any evidence rebutting the *prima facie* effect given to the claim by 41 & 42 Vict. c. 26, s. 23, I admitted the name. The same facts apply to the several persons whose names are set out in the schedule hereto annexed, and were admitted by me accordingly.

"The question for the Court is, Was I right in holding that the *prima facie* evidence of the declaration was not rebutted by the words 'services in lieu of rent'? If I was wrong in so holding, the names of the claimant, and of the persons named in the schedule, are to be struck out; if not, they are to remain admitted."

(1) 1 Lawson, 163.

H. D. Conner, K.C., and *W. H. Boyd*, for the appellant :—

The claimant is not entitled to the franchise. The claim discloses no relationship whatever of landlord and tenant, but only that of master and servant. A mere servant could have filled in this form with perfect truth, and this is an attempt to extend the lodger franchise to servants occupying, in respect of services rendered to their masters, portion of their master's house. The case is indistinguishable from, and is ruled by, *Jones v. Beveridge* (1). No doubt, in *Clarke v. Torish* (2), Porter, M.R., laid down that the lodger franchise does not depend upon payment of rent, but the claimant must be a lodger, not a servant. *Neilson v. Bryan* (3) is distinguishable.

Appeal.
1909.

TOPPING
v.
KROGH.

M'Sweeney, for the respondents :—

I submit that the claimant's name was rightly admitted. The original form of claim prescribed by section 5 of the Representation of the People (Ireland) Act, 1863, did not include any column headed "amount of rent paid"; the present form was prescribed by section 3 of the Parliamentary Registration (Ireland) Act, 1885, which provides that the forms in the first schedule thereto, "*or as near thereto as circumstances may require,*" shall be sufficient in law. This section has been complied with; and by section 23 of the Parliamentary and Municipal Registration Act, 1878, the declaration annexed to the notice of claim afforded *prima facie* evidence of the claimant's qualification, which evidence was not rebutted, as none was given on behalf of the objector. There is no distinction between this case and *Neilson v. Bryan* (3), where the claim was admitted. The qualification depends upon the value of the occupied premises, not upon the rent; and actual payment of rent is not essential: *Neilson v. Bryan* (3); *Clarke v. Torish* (2). *Bradley v. Colquhoun* (4) shows that the claimant would have been wrong in placing a monetary value on the services, and including such value in the claim. [He distinguished *Macdonald v. Dickson* (5), and *Jones v. Beveridge* (*Kavanagh's Case* (1).)]

(1) 20 L. R. Ir. 380.

(2) 18 L. R. I. 207.

(3) 35 Ir. L. T. R. 213.

(4) 20 L. R. Ir. 378.

(5) 16 Rettie, 143.

Appeal.
1909.

TOPPING
v.
KEOGH.
Nov. 15.

LORD O'BRIEN, L.C.J. :—

James Keogh claimed to be entitled to the lodger franchise; and the claim he sent in, with declaration annexed, was as follows :—

“I hereby claim to have my name inserted in the list of voters for this Registration Unit, in respect of the occupation of the undermentioned lodgings, and the particulars of my qualification are stated in the column below :—

“*Name of claimant in full—James Keogh. Description of rooms occupied, and whether furnished or not—Back room, furnished. Street and number of house—16, Seaview Avenue. Amount of rent paid—Services in lieu of rent. Name and address of landlord—Thomas Keogh, 16 Seaview Avenue.*”

“I hereby declare that I have, during the twelve calendar months immediately preceding the 20th day of July in this year, occupied as joint tenant with Joseph Keogh, and resided in, the above-mentioned lodgings; and that those lodgings are of a clear yearly value, if let unfurnished, of £20 or upwards.”

This is both claim and declaration.

The difficulty in this case arises by reason of the entry in the fourth column of the claim, viz. “Services in lieu of rent.”

The Revising Barrister states :—

—“The name was duly objected to, no evidence was given on the part of the objector in support of his objection, but it was contended by him that the words, ‘services in lieu of rent’ disclosed only the relation of master and servant; and that there was no averment of any separate contract for the occupation of the lodgings.

“No evidence was called on behalf of the claimant, and it was contended on his behalf that, as no evidence was given to rebut the declaration of the claimant, the claim should be admitted.

“I was of opinion that payment of rent in money was not essential to the qualification; and that the consideration for the letting of the room might take the form of services rendered: *Brown v. Ferguson* (1). I accordingly held that the claim was good on its face, and, in the absence of any evidence rebutting the *prima facie* effect given to the claim by 41 & 42 Vict. c. 26, s. 23, I admitted the name.

(1) 1 Lawson, 163.

"The question for the Court is—Was I right in holding that the *prima facie* evidence of the declaration was not rebutted by the words 'service in lieu of rent'?"

This is the question addressed to us by the Revising Barrister—a different question from that put in *Aiken's Case* (1), which see—and see also the point decided in that case, which was not the point I am now discussing. I have been very desirous to give in the language of the Revising Barrister the question he puts to us, and to which he expects and ought to get an answer. To the precise question put by the Revising Barrister, I answer that the *prima facie* evidence of the declaration is not rebutted by the expression, *services in lieu of rent*. I am of opinion that the words themselves, "services in lieu of rent," are sufficient; but that, taken in connexion with the entire claim and declaration, as it is competent for us to take them (*Ladd v. Farrell* (2)), they plainly indicate the relation of lodger and letter of lodgings, of landlord and tenant, and not of master and servant, though they indicate at the same time that no rent was to be paid in money. The words "services in lieu of rent," in my opinion, mean services *qua* rent—a distinctive rent from that at the head of the column, which is plainly a money rent. Here the word "services" represents at once the consideration and rent for the letting of the lodgings. I shall recur to this later on. Now it must be remembered that the payment of rent is not an essential element of the lodger franchise. The value of the lodgings, if let unfurnished, is the essential consideration. This is admitted. Well, what is the effect of the declaration? Section 23 of 41 & 42 Vict. c. 26, provides in so many words that the declaration annexed to the notice of claim shall be *prima facie* evidence of qualification. There is no quarrel here with the declaration; it is formally right, and it comprises all the elements of the lodger franchise. Well then, we have here *prima facie* evidence of the lodger franchise; how is that *prima facie* evidence of qualification said to be rebutted? By an alleged non-compliance with the requirements of column 4 of the claim, though that column deals with the payment of rent, and though rent, or its payment, forms no part of the qualification.

Appeal.

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Lord O'Brien,

L.C.J.

Porter, M.R., in whose judgment in *Aiken's Case* (1) May, C.J.,

(1) 18 L. R. Ir. 207.

(2) Lawson (1906), p. 216.

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Lord O'Brien,
L.C.J.

concurred, stated that the amount of rent, whether it must be stated in the claim or not, is, so far as concerns the qualification, immaterial. FitzGibbon, L.J., said, in the same case (p. 212), that the value of the lodgings, and not the payment of rent for them, constitutes the qualification. So did Naish, L.J. See also *Neilson v. Bryan* (1). This is, indeed, obvious from the statute which has created the lodger franchise. Well, if payment of rent is immaterial to qualification, how can the effect of statements, which show that the qualification is *prima facie* complete, be rebutted by a matter that does not affect qualification? The qualification is independent of the payment of rent; if so, how can an immaterial matter affect it? In my opinion, it cannot affect it. The qualification as stated is absolutely complete—perfectly clear. If this be so, how can that which is at most ambiguous *rebut* what is clear and complete in itself? No doubt it may be alleged, as was said in some of the cases, that the giving of particulars as to payment of rent is a condition precedent to the being admitted to the franchise; but this was not the point taken. The point taken was, that the expression “services in lieu of rent” rebutted the *prima facie* effect of the declaration. Indeed it is stated in *Jones v. Beveridge* (2) that the Court intimated “that a lodger’s claim was a condition precedent to his being admitted to the franchise, rather than a part of his actual qualification.” I entirely agree with this, and repeat my question. How can a complete statement, showing all the essential elements of qualification, be affected by that which is no part of the qualification and immaterial to it? The fallacy in the argument of counsel for the objector seems to me to consist in making the requirements of the 4th column an essential part of the qualification, as distinguished from a condition precedent to making a claim for admission to the lodger franchise. Personally, I think that the requirements of column 4 were, in any view of their exigency, complied with.

This, in my opinion, is enough to dispose of this case; but let me come to the actual words used, bearing in mind that the notice of claim may be in the form given in the schedule in the Act of 1885, or to the like effect, or as near thereto as circumstances may require (see 48 Vict. c. 17, s. 3). The words are, “services in lieu

(1) *Lawson* (1901), p. 9.

(2) 20 L. R. Ir. 380.

of rent," not "lodgings in lieu of money wages"; nor are they "included in salary" nor "part salary," whatever the last two expressions may mean. Of course, I should follow *Jones v. Beveridge* (1) if I thought the words used here and the question put here were substantially the same as those in that case; but, with all deference, I do not think so. Let me deal with the words here; I refer to column 4. "*Amount of rent paid*," the words at the head of column 4, plainly mean a money payment of rent; the words "*amount*," "*rent*," and "*paid*" plainly indicate this. "*Name of landlord*," and the words at the head of column 5, indicate the same thing. The words are, "The name and address of *landlord*," not "Name and address of *master*"; and the words "Services in lieu of rent" in the fourth column, and under the heading of that column, mean rent by way of services, and not rent by way of a money payment; that is to say, a distinctive rent from the rent at top of the column; the words represent at once the consideration and rent for the letting of the lodgings. That services can constitute a rent is well settled—is conceded. FitzGibbon, L.J., said, in *Neilson v. Bryan* (2), that payment of rent in money is not essential; but, as I have said, "Services in lieu of rent," taken in connexion with other headings, and the statements in the claim and declaration, make the thing, in my opinion, absolutely plain. The claim is in respect of the under-mentioned lodgings, room or rooms furnished or unfurnished—*unfurnished room* is not suggestive of a mere domestic servant's sleeping apartment. By the third column, particulars of the situation of the lodgings is required; by the fourth column, the name and address of the *landlord*, not, as I have said, of the *master*, is required. And the declaration states that the claimant occupied as joint tenant, and resided in the above-named lodgings; that is to say, that he resided in the designated lodgings as *tenant*, and not as *servant*. The words used in no way point to a mere ordinary menial servant, such as a butler or a cook, who may happen to have a mere sleeping apartment in his master's house; nor are they, in my opinion, in any way suggestive of the service franchise; that is to say, when a man occupies any dwelling-house by virtue of office, employment, or service, he is deemed to be an inhabitant occupier as tenant (48 Vict. c. 3, sect. 3). The

Appeal.
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Lord O'Brien,
L.C.J.

(1) 20 L. R. Ir. 380.

(2) 35 Ir. L. T. R. 213.

Appeal. claimant does not claim as an inhabitant occupier of a dwelling
 1909. as tenant—he claims as a lodger; and, as Porter, M.R., said in
Topping *Hasson v. Chambers* (1), there is no such thing as lodger service
v. franchise. To claim as a lodger is a necessary condition precedent
KEOGH. to his being admitted to the lodger franchise. It is a distinctive
 Lord O'Brien, peculiarity of the lodger franchise: *Cullen v. Patterson* (2); and
 L.C.J. *Hersent v. Halse* (3).

In my opinion, the words used here in claim and declaration, when taken together, not only are inconsistent with, but distinctly negative, the relation of master and menial servant, or the existence of a claim in respect of the service franchise. Indeed, I am not at all sure that this case is not, though I do not categorically affirm that it is, concluded by the decision in *Neilson v. Bryan* (4). That case was apparently elaborately argued; the principal, if not all, the authorities on the subject were cited; and it was held that the expression “no rent by agreement” was sufficient to maintain a claim. In giving judgment, I relied principally upon section 23 of 41 & 42 Vict. c. 23. So did the present Lord Chancellor, then Walker, L.J. Lord Justice FitzGibbon stated that the decision of the Court was a decision on demurrer, not on facts proved or evidence given, but on the sufficiency of a statement in a document corresponding to a pleading. Now, on a demurrer, every intendment is made in favour of a pleading (see Bewley and Naish, p. 77, where the cases are collected). But it is, in my opinion, wholly unnecessary to refer to any rule that may obtain on demurrer. The true test is—What is the fair, natural, and reasonable construction of the words used? and I think no special words, no special form of agreement, is necessary. FitzGibbon, L.J., may have said otherwise; but upon this I must regard what he said as a dictum. The other Judges said nothing to the effect that there should be a special agreement elaborately stated; nor does such a proposition receive any support from the third section of 48 Vict. c. 17. The general community, comprising as it does persons who seek the franchise, does not express itself after a very precise fashion; to substantially convey what it means ought to be deemed sufficient. Here what is meant is, in my opinion, plain enough; indeed I think what

(1) 18 L. R. Ir. 77.

(3) 1 Fox Reg. Cas. 12.

(2) 18 L. R. Ir. 274.

(4) Lawson, 1901, p. 9.

is said necessarily involves that there was an agreement that the services were to be a rent, or, putting it in another way, that the rent should consist of services.

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In the same case, *Neilson v. Bryan* (1), Holmes, L.J., said :—
“The case turns upon the construction of the declaration. Taking the document in its entirety, it is this. He holds lodgings under an agreement, one of the terms of which is, that he is to pay no rent.” These were the words of the Lord Justice. Now, in this case, I think the words “services in lieu of rent” in the column under the head of payment of rent imply an understanding, an agreement between the parties that there should be no rent in the way of a money payment, but that the services were to be a *redditus* for the letting of the lodgings.

Lord O'Brien,
L.C.J.

Of course where there is a specific rent in moneys numbered agreed to be paid, the amount of this specific rent should be stated; but where the agreement or understanding is that no specific rent is to be paid, no figure can be given. Here the words imply that there was to be no rent in moneys numbered, but that services were to be rendered in lieu of a rent in moneys numbered, that in fact the services were a rent.

Just a word before I conclude with reference to *Bradley v. Colquhoun* (2)—see report of the case in Lawson's Reports, Notes of Decisions 1885–1893, p. 180, and see what Sir Andrew Porter, the then Master of the Rolls, is reported to have said with reference to it at page 182.

He said that in *Bradley v. Colquhoun* (2) it was impossible to gather whether there was a rent or not. Here it is quite plain there was a rent, because it is manifest that services were a rent rendered in lieu of a rent in moneys numbered. “Amount of rent paid” at the head of column 4 plainly indicates a payment of rent in so much money; and “services in lieu of rent” under this head in this column, in my opinion, plainly point to a distinctive rent, namely, services as distinguished from a rent in so much money.

But I recur to the question stated for our consideration—whether the words “services in lieu of rent” rebut the *prima facie* effect of the declaration? This is the question asked, and this question I am of opinion should be answered in the negative.

(1) Lawson, 1901, p. 9.

(2) 20 L. R. Ir. 378.

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PALLES, C. B.:—

I am of opinion that the decision of the Revising Barrister should be reversed, and that the claim to the franchise should be disallowed. To my mind the case is ruled by *Jones v. Beveridge* (*Kavanagh's Case*) (1). I cannot differentiate in relation to their effect on the lodger franchise between the words, "services in lieu of rent" and "part salary." Service is the correlative of salary.

The Court as now constituted is bound by the above decision, and I am unwilling to fritter away its effect by an unsubstantial verbal difference.

I desire to add that had the matter been *res nova* I should have decided the same way.

I agree with the view stated by FitzGibbon, L.J., in *Clarke v. Torish* (*Aiken's Case*) (2), that if such a claim as that here were admitted we should run the risk of letting in, under the name of lodgers, servants and assistants residing with their employers if the accommodation they enjoy is worth £10 a year, though such persons are not within the Representation Act, 1884, section 3. I also agree with him that to constitute *rent* there must be an agreement fixing it, and that the requisition in the form to state the name of the person to whom the rent is paid is not satisfied by giving the name of an employer who allows his employee his lodging as part of his remuneration, at least, unless the allowance is made under a very special agreement constituting him a lodger as distinguished from a servant, and in such a case the special matter should be stated.

In the present case the words "services in lieu of rent" go to indicate, as did the words "part salary" in *Jones v. Beveridge* (*Kavanagh's Case*) (1), service franchise rather than that of a lodger, notwithstanding the statement in the declaration.

We were rightly pressed by Mr. M'Sweeney with the words of the claim in *Aiken's Case* (2), "£10 and upwards, included in salary." The only objection in that case was that the words "and upwards" were too vague, and one of the answers to the objection was that the Revising Barrister ought to have amended.

The true ground of the decision there was that, although, as held by FitzGibbon, Barry, and Naish, L.JJ., the claim in its unamended form was bad, there ought to have been an amendment.

Fitz Gibbon, L.J., states (p. 214), "I believe the majority of the Court have found themselves able to construe this special case as conveying that each and every one of these claimants had applied, and was prepared, to amend his claim by inserting a specific sum which he could prove was the agreed rent for his lodgings, whether paid in cash or set off against salary; and, further, that the Revising Barrister was satisfied that the omission of the specific sum was a mistake; and further, that the objectors agreed to a reservation that if the decision that the Revising Barrister had no power to amend by inserting the specific sum was wrong, all the claimants should be placed on the register without any further evidence, and without any amendment being in fact made."

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That case, decided on such grounds, is authority against, and not for, these claimants' case. That was the view of it taken in *Kavanagh's Case* (1), to which three of the judges who decided *Aiken's Case* (2) were parties, and the note of the decision in which commences by suggesting that the case was practically ruled by *Clarke v. Torish (Aiken's Case)* (2) and *Bradley v. Colquhoun* (3). In the latter of these cases the column was filled up with the words "*estimated rent, 5s. weekly,*" and the claimant was held not to be entitled to the franchise.

HOLMES, L.J. ;—

The question raised by this appeal is of considerable importance, inasmuch as if the view taken by the Revising Barrister be correct, it will probably have the effect of giving the lodger franchise to a class of persons upon whom the Legislature did not intend to confer it—I mean domestic servants who are paid wages, and are receiving board and lodging in the dwelling-house in which their employers reside. My reason for entertaining the view I have expressed as to the intention of the Legislature is that there is a definite service franchise provided for by section 3 of the Representation of the People Act, 1884, the character of which is wholly different. I hold that the lodger franchise does not depend upon the amount of rent paid, but upon the value of the lodgings if let unfurnished. I also hold that there may be rent which is not paid in money. It may be paid by something

Appeal. 1909. *TOPPING v. KEOGH.* *Holmes, L.J.* having a money value; but there must be a contract to pay some definite rent for the lodgings, and this does not appear in the present claim. Furthermore, I agree with the judgment in this Court in *Jones v. Beveridge*; and even if I differed from it, I should feel myself bound to follow it. The rent in that claim was described by the words "part salary"; and the Court held that this description went to indicate a service franchise rather than that of a lodger, notwithstanding the statement in the declaration being *prima facie* evidence of a tenancy. The description in this case—"services in lieu of rent"—is, in my opinion, a stronger indication of the same thing.

Solicitor for the appellant: *J. F. Craig.*

Solicitor for the respondent: *P. M. Seales.*

R. ST. J. C.

K. B. Div.
1909.

MAC FARLANE *v.* BOOTH (1).

Feb. 8.
June 29.

Land Purchase Acts—Intervening interest—Sale to sub-tenant—Liability for arrears of rent—Irish Land Act, 1903 (3 Edw. 7, c. 37), ss. 15, 16, 25—Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), s. 14.

Where the owner of an estate agrees to sell, under the Land Purchase Acts, a parcel of land to a sub-tenant in exclusive occupation thereof, and orders are made by the Irish Land Commission vesting the land in the sub-tenant, ordering payment into the Bank of Ireland of the purchase-money, and directing claims to attach to it, and declaring that the sub-tenant shall be deemed a tenant, and the parcel of land a holding, the sub-tenant is discharged from liability in respect of arrears of rent due to his immediate landlord.

CASE STATED by Madden, J., on the hearing of a civil-bill appeal. The case set out as follows:—

"This was a civil bill for £18 19s., one year's rent alleged to be due and payable by the defendant out of part of the lands of Derrycash, up to and for the 1st November, 1907. The County Court Judge gave a decree for the full amount. From this decree

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

the defendant appealed, and the appeal was heard before me at Omagh on the 13th July, 1908. It was proved or admitted that the plaintiff held these lands from Mr. Frederick Acheson Montgomery Moore as a yearly tenant, after the expiration of a lease which had expired many years ago, at a yearly rent of £10 19s. 3d., and that the year's rent due on the 1st November, 1907, had been duly paid by plaintiff's agent to Mr. Denroche, the agent for the said Mr. F. A. M. Moore, on the 21st December, 1907. The defendant was a sub-tenant to the plaintiff of the said lands. In the year 1905 the said F. A. M. Moore was desirous of selling his whole estate, which comprised the said lands of which the defendant was sub-tenant, to his tenants, under the Land Purchase Acts; and the defendant, who was in exclusive occupation of the said lands as such sub-tenant, being desirous of purchasing the said lands under the said Land Purchase Acts, entered into negotiations with the plaintiff to purchase her tenancy from her in order to enable him to do so; but as the price of such tenancy could not be arranged between plaintiff and defendant, the negotiations fell through. Negotiations were then entered into between the said F. A. M. Moore and the defendant for the sale of the said lands by the said F. A. M. Moore to the defendant, as a sub-tenant, under the provisions of section 15 of the Irish Land Act, 1903. Of these negotiations the plaintiff's agent admitted he was aware, but denied knowledge of the agreement hereinafter mentioned until a considerable time after it had been entered into. The negotiations between the said F. A. M. Moore and the defendant culminated in the purchase, under the said section, by the defendant from the said F. A. M. Moore on the 1st November, 1907, of the holding, which comprises only the lands for a year's rent of which this action was brought by the plaintiff as intermediate landlord. The agreement for purchase was signed by the said F. A. M. Moore and the defendant on the 1st November, 1907, and was duly lodged with the Irish Land Commission; and the said F. A. M. Moore having sold the whole of his estate under the Land Purchase Acts, and same having been vested in the respective purchasers, the Land Commission, by an order made in the matter of the estate of the said F. A. M. Moore, and dated the 30th January, 1908, ordered that the sum of £33,344, being

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K. B. Div. the amount of the purchase-money advanced under the Land
 1909. Purchase Acts in respect of the whole of the said estate, as defined
MACFARLANE by order dated 30th January, 1908, endorsed on the originating
v. application, which estate comprised the said lands, be paid into
BOOTH. the Bank of Ireland to the account of the Irish Land Commission
 and the credit of the said estate; and, after directing that certain
 other sums should be transferred to the credit of the said estate,
 declared that thereupon the claims of certain persons therein men-
 tioned should attach to the purchase money of such lands, in like
 manner as, immediately before the date of said order, they
 attached to such lands. The said purchase-money, which included
 the sum of £338, the purchase-money of the holding which com-
 prised the said lands for the rent of which this action was brought,
 was duly paid into the Bank of Ireland to the credit of the said
 estate on the day of , 1908, and the said transfers
 have been duly made; and by an order dated the 6th June, 1908,
 and made in the matter of the estate of the said F. A. M. Moore,
 the Estates Commissioners, pursuant to the provisions of sect. 15
 of the Irish Land Act, 1903, declared that the defendant, who, as
 sub-tenant of the plaintiff, was in exclusive occupation of the
 parcel of land mentioned in the schedule thereto (being the parcel
 comprised in the holding in respect of which this action was
 brought), was thereby deemed the tenant of that parcel, and the
 said parcel was thereby deemed a holding.

“Counsel for the defendant contended that on the above state
 of facts the plaintiff was precluded by the provisions of the Irish
 Land Act, 1903, particularly sections 15, 16, and 24 thereof, and of
 section 14 of the Land Law (Ireland) Act, 1887, from recovering
 the rent sued for in this action, and that in any case the action
 was premature, having regard to section 35, sub-section 1, of the
 Land Law (Ireland) Act. 1896, and applied for a case stated.

“The questions for the Court are:—

“(1) Under the facts and circumstances above stated, can the
 plaintiff, having regard to the provisions of the Irish Land Act,
 1903, and Land Law (Ireland) Act, 1887, recover in this action?

“(2) Was this action properly brought, notwithstanding the
 proviso in section 35, sub-section 1, of the Land Law (Ireland)
 Act, 1896?”

Todd, K.C. (with him *Patton*), for the defendant :—

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The holding having been vested in the defendant, the purchase-money paid into the Bank of Ireland, and an order made attaching claims to the purchase-money, the effect was to vest the fee-simple in the defendant discharged from the claims of all persons interested in the land, whether in respect of superior or intervening interests, and such claims have ceased as against the land and attach now to the purchase-money. The policy of the Land Purchase Acts is, that the tenant-purchaser should start clear: Land Law (Ireland) Act, 1896, sect. 31, sub-sect. 1, and sect. 35, sub-sect. 1; Irish Land Act, 1903, sect. 24, sub-sect. 8; *Burchall v. Coyle* (1). An arrear of rent is a superior interest: Land Law (Ireland) Act, 1896, sect. 31, sub-sect. 8; *Burchall v. Coyle* (1).

Henry, K.C., and *Babington*, for the plaintiff :—

The provisions of the Land Purchase Code extinguishing liability in respect of arrears of rent, apply only as between vendor and purchaser, and no such relation exists in the present case. Section 35, sub-sect. 1, of the Land Law (Ireland) Act, 1896, discharges the purchaser from all liability "to the vendor" in respect of rent and arrears, but this cannot apply here, where the plaintiff is not the vendor. What is redeemed under sect. 15 of the Irish Land Act, 1903, is the intervening estate, not the arrears of rent. The object of section 24, sub-section 8, of the Act of 1903 was to compensate a tenant for life, or an owner whose estate was heavily encumbered, for his loss of the arrears. The sub-section deals with arrears which "were due," but as it contains no provisions in itself extinguishing liability for arrears, it can only operate in respect of arrears the liability for which has been extinguished by some other section of the Land Purchase Code. The only such section is section 35, sub-section 1, of the Act of 1896, which, as already pointed out, does not apply to a case like the present. In *Burchall v. Coyle* (1) the relation of vendor and purchaser existed. It was not really necessary for the purpose of the decision in that case to hold that arrears of rent constituted a superior interest, since the plaintiff's claim there was clearly barred by section 35, sub-section 1, of the Act of 1896. But in any

K. B. Div. view the decision does not apply, since the plaintiff's interest here 1909. is not a superior interest, but an intervening interest.

MACFARLANE [They also referred to *French v. Mitchell* (1).]

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Patton; in reply.

Cur. adv. vult.

June 29.

BOYD, J. :—

This case was heard before the Lord Chief Justice, my brother Gibson, and myself. We have agreed to our judgment, and agreed that it should be delivered by my brother Gibson. He has sent me his written judgment, which I proceed to read as the judgment of the Court.

GIBSON, J. :—

This case raises a question of much difficulty. The solution depends mainly on sections 15, 16, and 24 of the Irish Land Act of 1903. The competing arguments on each side are nearly of equal weight. For the plaintiff, it is said with force that rent accrued due and constituting a personal debt cannot be extinguished without express and clear language, and that the legislation, whatever may have been intended, contains no such language. On the other hand, it is argued that the dominating policy or plan of the Legislature is, that the purchasing tenant should be free from all antecedent rent liabilities, and that such liabilities should be transferred to the purchase-money. If such liabilities were not so transferred, the landlord creditor would be prejudiced, for his real security would be extinguished; he could not distrain or eject, and his remedy would be no better than that of ordinary creditors.

On the whole, taking the statutes of 1896 and 1903 together, with much doubt I am inclined to adopt the defendant's construction. The purchasing tenant is made direct tenant of the superior landlord, and "the intervening interest" is put in the same position as the "superior interest." The language of section 16 (made applicable by section 24, sub-section 1) is very wide and is

extremely strong. No distinction is made between claims "in respect of" superior and intervening interests. I did not understand that, in the case of a superior interest, it was disputed that claims like the present would have been transferred.

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Gibson, J.

In my view, section 24, sub-section 8, so much relied on for defendant, would not apply, for two reasons. In the first place, section 16 attaches to the purchase-money all claims, without any restriction to one year. Secondly, if this was not so, section 24, sub-section 8, is not so clearly expressed as to extinguish debts in respect of which there was a vested right of action possessed by a person other than the vendor. The sub-section is loosely worded, and is at least capable of the construction proposed by Mr. Henry, K.C.

My colleagues have a stronger opinion than I entertain; but, on the whole, I incline to think that the more probable intention to be attributed to the Legislature is that which I have indicated.

THE COURT answered the first question in the negative, and declined to answer the second question as being unnecessary.

Solicitor for the plaintiff: *E. V. Hamilton.*

Solicitor for the defendant: *G. M'Ilroy.*

J. G. T.

M'GETTIGAN v. ROULSTONE (1).

Appeal.
1909.

Parliamentary franchise—£5 freeholder—Representation of the People (Ireland) Act, 1850 (13 & 14 Vict. c. 69), s. 2—Title—Local Registration of Title (Ireland) Act, 1891—Registered land—Unregistered transferee.

Nov. 8.

The transferee of land registered under the Local Registration of Title (Ireland) Act, 1891, is not entitled to the freehold franchise until the transfer is registered.

APPEAL by the Rev. John M'Gettigan (claimant) from the decision of Mr. Williamson, Assistant Revising Barrister for the County of Tyrone.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and HOLMES, L.J.

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C

Appeal.
1909.
M'GETTIGAN
v.
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The case stated was as follows:—

"The name of the Rev. John M'Gettigan appeared on the claimants list (Form No. 6), at No. 31 of the registration unit of Dunalong as a £5 rated freeholder or £20 freeholder.

"The following facts were proved:—

"The premises out of which the claimant proved was a farm claimant had in sole occupation during the qualifying period, and the value was sufficient. Charles E. M'Gettigan had been registered owner of the lands, under the Local Registration of Title Act, 1891, Folio No. 2390, and a certified copy of the land certificate was produced and, marked 'A,' is annexed hereto. Charles E. M'Gettigan died on 25th April, 1908, intestate and unmarried, leaving Hugh M'Gettigan his sole next-of-kin. On 24th August, 1908, letters of administration were granted to the said Hugh M'Gettigan; said letters of administration marked 'B' are annexed hereto. Said letters of administration were not registered in the Local Registration of Title Office. On the 19th day of January, 1909, said Hugh M'Gettigan conveyed the said farm to Rev. John M'Gettigan, the claimant, but said conveyance was not registered in the Local Registration of Title Office. Said conveyance is hereto annexed marked 'C.'

"On behalf of the objector it was contended that until the conveyance from Hugh M'Gettigan to the claimant was registered the claimant acquired no estate in the lands, and I was referred to section 25 of the Local Registration of Title Act, 1891, and to *Torish v. Orr and Smith* (1). It was contended on behalf of the claimant that the claimant being in actual occupation and possession in fact of an estate of freehold of sufficient value, he was entitled to register, and that while his title might not be complete, it was sufficient for the purpose of the franchise; and I was referred to the case of *M'Philemy v. Harpur* (2) and the statute.

"I held as a fact that claimant was in actual occupation and possession, but that until the conveyance was registered he could not be seised, and that I was bound by the case of *Torish v. Orr and Smith* (1), already mentioned, and but for this case, I would have admitted him to the franchise.

(1) [1894] 2 I. R. 381.

(2) Lawson, 1906, p. 292.

"If I was wrong in so holding, the name of Rev. John M'Gettigan is to be admitted. *Appeal.*
1909.

"J. WILLIAMSON." M'GETTIGAN
v.
ROULSTONE.

Ignatius J. O'Brien, K.C., and Gerald Dougherty, for the appellant:—

As to the £20 freehold franchise in Ireland, see Hudson on Registration, p. 58; 35 Geo. 3 (Ir.), c. 29, s. 26; 2 & 3 Wm., 4, c. 88, Sched. C, No. 4; Hunt's Franchise and Registration Law, pp. 4, 5. The history of the freehold franchise in England is given in Rogers on Elections, 1, 2. The £5 freehold franchise in England was conferred by the Representation of the People Act, 1867, sect. 5. That section did not extend to Ireland. The only sections of that Act extended to Ireland by 48 Vict. c. 3, are sections 3, 26, and 28. In Ireland the £5 freehold franchise was conferred by section 2 of the Representation of the People (Ireland) Act, 1850 (13 & 14 Vict. c. 69). It is submitted that the conveyance from Hugh M'Gettigan to the claimant, coupled with possession, was sufficient for the purpose of the franchise, though for the purpose of making strict legal title, as in the case of an ejectment, or in order to retain or acquire priority, registration might be necessary.

Babington, for the objector.

Glenn v. Brennan (1) and *Roulston v. Kerlin* (2) were decided under section 3 of the Act of 1867 (30 & 31 Vict. c. 102). But this case comes under section 2 of the Act of 1850 (13 & 14 Vict. c. 69). The difference between the two sections is that, for the occupation franchise, title need not be proved; but when a claim is made to the freehold franchise, the claimant must be seised of the estate. Here the point was taken before the Revising Barrister, who was of opinion that the case was ruled by *Torish v. Orr and Smith* (3). It is said that the claimant was equitably seised; but he had no title till his conveyance was registered. [The Lord Chief Justice referred to *M'Philemy v. Harpur* (4).] In that case

(1) 29 Ir. L. T. R. 79.

(2) [1908] 2 I. R. 335.

(3) [1894] 2 I. R. 381.

(4) 43 Ir. L. T. R. 98.

Appeal. the conveyance was executed between the agreement to purchase
 1909. and the vesting order. Here the farm is still vested in Hugh
 M'GETTIGAN M'Gettigan. It is assets of the intestate, and a creditor of the
 v. deceased by obtaining judgment, and registering his judgment as
 ROULSTONE. a mortgage, and under the Local Registration of Title Act, would
 be able to oust the claimant altogether: *Pim v. Coyle* (1): Local
 Registration of Title Act, 1891, sects. 25, 35. There is no relation
 back in a transfer. *M'Philemy v. Harpur* (2) does not touch
 the present case, the claim there being based on occupation, not
 upon seisin.

O'Brien, K.C., in reply :—

Pim v. Coyle (1) is, no doubt, an authority where a question of priority arises, but is not a decision on the law of franchise, and has no application here. Hugh M'Gettigan was the sole next-of-kin as well as administrator of the deceased. He had all the estate, he transfers it, and the transferee enters into possession.

LORD O'BRIEN, L.C.J. :—

The Revising Barrister decided this case on *Torish v. Orr and Smith* (3), and I think he was right. The question depends upon title, and not upon occupation, and the claimant could not be entitled to the franchise until his conveyance was registered under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66). Section 25, sub-section 1, enacts that "A person shall not, under any conveyance executed on or after the commencement of this Act, acquire *any estate* in any such land until he is registered as owner of the land."

In *Torish v. Orr* (3) the Lord Chief Baron says that "under this sub-section it is plain that the property does not pass until registration." Therefore, it is quite obvious there was no actual title in the claimant. Actual title, as distinguished from the mere character of occupation, is essential, having regard to the words of the Act.

I think the Revising Barrister was right.

PALLES, C.B., concurred.

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1909.

HOLMES, L.J. :—

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v.

ROULSTONE.

I concur. In the case referred to (*M'Philemy v. Harpur* (1)), which was before us last year, the Lord Chief Justice said the question was not a question of strict legal title, but one of occupation only. I quite agree with what has been said about the difference between a franchise depending on title and one conferred by occupation. Here what is claimed is a franchise based upon seisin of an estate, and where title to the estate does not exist there is no ground for the claim.

Solicitor for the appellant: *James Roche*.

Solicitors for the respondent: *Wilson & Simms*.

W. G.

COYLE v. M'FARLAND (2).

Appeal.
1909.

Parliamentary franchise—Claim to be rated—Representation of the People (Ireland) Act, 1850, sections 15, 20, 23, 110—Registration (Ireland) Rules, 1899, Schedule, Part I, Rule 3—Supplemental List.

Nov. 8.

Where a person otherwise entitled to the franchise as rated occupier has been omitted from the rate, and claims to be rated between the publication of the Rate Book and that of the Supplemental List of Rated Occupiers, and has paid all rates due in respect of the qualifying premises, he is properly placed on the Supplemental List.

APPEAL from the decision of Mr. John M'Gonigal, Assistant Revising Barrister, County Tyrone, admitting the name of James Andrew McFarland on the supplemental list of rated occupiers.

The case stated was as follows :—

“At a Court held by me as one of the Assistant Revising Barristers for the County of Tyrone at Castlederg, on the 18th

(1) 43 Ir. L. T. R. 98.

(2) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and HOLMES, L.J.

Appeal. day of September, 1909, for the revision of the lists of voters for
 1909. the polling district of Castlederg in the Parliamentary Division of
 COYLE North Tyrone, the name of James Andrew M'Farland appeared
 v. in the supplemental rated occupiers list (Form No. 11) at No. 18
 M'FARLAND. of the registration unit of Magheracreggan as a rated occupier of
 £10 and upwards, and was duly objected to by James Doyle on
 the ground that he was not rated.

"The following facts were proved:—

"The voter's father, who was owner of, and rated for, the premises, died on the 31st day of August, 1908. He had previously made a will leaving the premises, out of which the voter claimed, to the voter, and probate of this will was granted on the 3rd day of April, 1909.

"The voter's name did not appear in the rate-books. Voter had served a claim to rate on the 9th day of June, 1909. The rate-book was published on the 26th day of April, 1909. The rated occupiers list (Form No. 11) was published on the 22nd day of July, 1909.

"On behalf of the objector it was contended that the voter's name should not appear in said supplemental rated occupiers list, and that a claim to rate was not applicable to this list. In support of this I was referred to section 3 of the Precept of the Clerk of the Peace to the Secretary of the County Council; Registration (Ireland) Rules, 1899, Schedule, Part I., Counties (Vanston, vol. 2, 1408).

"The objector contended that under this precept only those actually rated could appear on the list, and that voter should have come up on the claimants list. He argued that it was for cases of this sort claimants list was provided.

"On behalf of voter it was argued that a claim to rate was quite sufficient for and applicable to the name on the said supplemental rated occupiers list. I agreed with this, and admitted the voter to the franchise. If I was wrong in so doing, the name of the said James Andrew McFarland is to be struck out.

"Being requested, I name James Toner, Clerk of the Peace, as additional respondent in this case.

"JOHN M'GONIGAL,

"Assistant Revising Barrister."

Ignatius J. O'Brien, K.C., and Gerald Dougherty, for the *Appeal*.
 objector :— 1909.

This name should not have appeared on the supplemental list, as James Andrew M'Farland was not rated. It is only persons actually rated in the last rate made for the relief of the poor who are entitled to be put on that list: see Registration (Ireland) Rules, 1899, Schedule, Part I. (Precept to Clerk of the Peace), Rule 3; Vanston's Local Government, vol. 2, p. 1408; Form No. 11, Vanston, vol. 2, p. 1413 (Supplemental List). The heading of the 2nd column shows that only persons rated are to be included in this list: Representation of the People (Ireland) Act, 1850, sections 15, 20, 22. Section 20 specifically directs that every person who has not paid the rates should be excluded from the Supplemental List. Under section 110 of the Act of 1850 a person not rated may claim to be rated, and then if he pays or tenders the rates due he is to be deemed to have been rated in respect of the premises. But he is not deemed to have been rated in sufficient time to enable him to vote. The name should have been put on the claimants list. The importance of the case is that it involves the onus of proof. If a name appears on the Supplemental List, the objector has to prove want of qualification, but a claimant must prove his right to the franchise.

D. S. Henry, K.C., and Babington, for the respondents:—

Section 110 was evidently passed to meet a case of this very kind. Where an occupier otherwise entitled to the franchise is not rated, he may claim to be rated. This claim, which formerly was served on the Clerk of the Union, is now in counties to be served on the Secretary of the County Council (*M'Caughey v. Baird* (1)). The County Council must then on payment or tender of the rates due, either insert his name in such rate, or, if they refuse to do so, he is deemed to have been rated. It is impossible that in the face of these provisions a voter can be disfranchised through the mistake of an official.

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COYLE
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LORD O'BRIEN, L.C.J. :—

Section 110 of the Representation of the People Act, 1850, enacts that "It shall be lawful for any person who shall occupy lands, tenements, or hereditaments rated under the Acts for the more effectual relief of the destitute poor in Ireland at a net annual value of £12 or upwards in any electoral division in any county . . . in which there shall be a rate for the relief of the destitute poor, and whose name shall have been omitted from such rate, to present to the guardians of the union a claim to be rated in respect of such premises . . . and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates . . . due in respect of such premises, the guardians of the union shall insert the name of such occupier in such rate in respect of such premises as aforesaid ; and in case such guardians shall neglect or refuse so to do, such occupier shall for the purposes of this Act be deemed to have been rated in respect of such premises in the rate in respect of which he shall have claimed to be rated as aforesaid."

Repeating the words "such occupier shall for the purposes of this Act be deemed to have been rated in respect of such premises in the rate in respect of which he shall have claimed to be rated as aforesaid," and emphasizing the word "*deemed*," I think that this section concludes the controversy, and that the Revising Barrister was right.

PALLES, C.B., concurred.

HOLMES, L.J. :—

Under section 110 of 13 & 14 Vict. c. 69, if the amendment in the rate-book has not been made, the final words of the section came into operation, and the claimant is to be deemed to be rated, and is to be put on the supplemental list as if he had been originally rated.

Solicitor for the appellant: *James Roche*.

Solicitor for the respondents: *Thomas Elliott*.

DEBORAH E. BELL AND ELLEN LUCAS, APPLICANTS;	<i>Appeal.</i>
THE COUNTY COUNCIL OF KING'S COUNTY,	1909.
RESPONDENTS (1).	Dec. 10.

Malicious injury—Fence—Damage to—Compensation—6 & 7 Wm. 4, c. 116, s. 135—61 & 62 Vict. c. 37, s. 5.

An ordinary wire fence adjoining a road, but not connected with any canal or navigation, was maliciously destroyed, to the extent of £3:—

Held, that the fence was not included in the words “other work” in the 135th section of 6 & 7 Wm. 4, c. 116, and was not the subject of compensation under that Act, as extended by the Local Government (Ireland) Act, 1898.

CASE STATED by Madden, J., at the Summer Assizes, 1909, for the King's County, as follows:—

“In this case the applicants, who were landowners, applied for £5 compensation for the malicious destruction of about 50 yards of new wire fence on the 4th May, 1909. The County Court Judge made a decree for £3, and the County Council appealed. On the hearing at the Assizes it was admitted that the fence had been maliciously destroyed, and that it was an ordinary road fence, not connected with any canal or navigation.

“For the applicants it was contended that such a fence was not the subject of compensation under the Grand Jury Act, as extended by section 5 of the Local Government Act of 1898. It was stated on behalf of the County Council that they were desirous of having an authoritative decision as to whether an ordinary road fence was the subject of compensation under these Acts, and they expressed their willingness to abide their own costs, if successful, of a case to be stated for the decision of the Court of Appeal.

“I was referred to a decision of Perrin, J. (*In re Fitzpatrick* (2)), upon which the judgment of the County Court Judge

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(2) Ir. C. C. R. 819.

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was founded. Following this decision, I confirmed the decree; and as the question involved was of general application, I agreed to state this case on the terms aforesaid.

"The question for the decision of the Court is, whether an ordinary wire fence is the subject of compensation, under the above-mentioned statutes, if maliciously destroyed."

Denning (with him *Powell, K.C.*), for the appellants:—

The words "other work," in section 135 of 6 & 7 Wm. 4, c. 116, must be read as including works *ejusdem generis* with those specified in the immediately preceding words, and do not include an ordinary wire fence not connected with a canal or navigation. Section 70 of 3 & 4 Wm. 4, c. 78, contains provisions for compensation in respect of malicious injuries to all the classes of property mentioned in section 135, save that last mentioned, *i.e.*, any bank, gate, &c. As the effect of section 70 of 3 & 4 Wm. 4, c. 78—though not purporting to do so—was to repeal all former laws on the subject of malicious injuries to property (see *Re Carlow Presentment* (1)), the words "any bank, gate," &c., had to be re-introduced into sect. 135 of 6 & 7 Wm. 4, c. 116, and these words were taken verbatim from section 10 of 56 Geo. 3, c. 55 (repealed by 4 Geo. 4, c. 73), where it is clear that the words "other work" must be construed as *ejusdem generis*. In *In re Fitzpatrick* (2) Perrin, J., held that fences came within the words "other work"; but it is submitted that that decision, which was given on circuit, should not be followed. In *In re Collier* (3) Dowse, B., held that the words "other work" refer to matters *ejusdem generis* with the preceding words: *In re Revington's Presentment* (4); *Re Grattan Bellew* (5). [He referred also to section 25 of the Malicious Damage Act, 1861.]

F. W. Price, for the applicant:—

A fence comes under the words "other work" in section 135. *In re Fitzpatrick* (2) is a clear decision in my favour; and

(1) Jebb's C. C. 180.

(2) Ir. C. C. R. 819.

(3) 8 I. L. T. R. 208.

(4) 15 I. L. T. R. 50.

(5) Brett on Malicious Injuries,
p. 51.

Dowse, B., approved of that decision in *In re Collier* (1); *Re Wexford Malicious Injury* (2). "Work" is an apt word to apply to fences, and is used in the same Act as applicable to them: see section 12.

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Section 7 of 56 Geo. 3, c. 55, contemplates that fences should be erected on the banks of "canals and navigations." It follows that "other work" in section 10 of that Act includes such fences; therefore when these words were inserted in section 135 of 6 & 7 Wm. 4, c. 116, with the addition of the words "belonging to any person," they include fences other than those belonging to a canal or navigation.

THE LORD CHANCELLOR:—

We are all of opinion that we must answer this question in the negative.

Section 135 of the statute 6 & 7 Wm. 4, c. 116, deals with five subject-matters:—(1) any house, outhouse, or other building; (2) any haggard, corn, hay, straw, or turf; (3) any boat or barge laden with corn or other provisions; (4) any horse, mule, ass, or swine, or any horned cattle or sheep; and (5) any bank, gate, lock, weir, sluice, bridge, dam, or other work belonging to any person, public canal, or navigation.

I think that these are all perfectly distinct subject-matters, and that the words "or other work" are *ejusdem generis* with the particular subject-matter with which they are coupled, namely, the fifth of those to which I have referred.

Section 5 of the Local Government (Ireland) Act, 1898, has extended the right to compensation in certain cases; but, although the Legislature was aware as to how the law stood, it left it unchanged in respect of such a case as the present. It is admitted that the applicant is not entitled to compensation under those extended provisions (1) because the damage sustained was under £5, and (2) because the malicious act was not a crime punishable on indictment under the Malicious Damage Act, 1861. The applicant is therefore remitted to the 135th section. We must construe this section as we find it; and, as we are all of opinion

(1) 8 I. L. T. R. 208.

(2) Brett on Malicious Injuries, p. 57.

Appeal. that the words "or other work" are *ejusdem generis* with those
1909. immediately preceding, we cannot hold that the malicious damage
to the fence here in question comes within the purview of the
BELL section, and the applicant's claim for compensation must accord-
v. ingly be dismissed.
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HOLMES, L.J. :—

I concur. Decisions of judges at assizes are generally given without any very extended argument; they sometimes could not stand the test of argument, even before the judges who gave them, and I therefore do not attach much importance to circuit decisions such as have been referred to.

I have always understood, however, that it was definitely settled, prior to the passing of the Local Government Act of 1898, that the words "other work" in this section of the Grand Jury Act must be taken to be *ejusdem generis* with what went before; and it is a matter of certainty that, if we are to construe them in that particular way, they must refer to something connected with a canal or navigation, because all the previous words would be misdescriptions if otherwise applied.

We, accordingly, cannot allow compensation.

CHERRY, L.J., concurred.

Solicitors for the applicant: *A. & L. Goodbody.*

Solicitor for the County Council: *Thomas Conicay.*

R. ST. J. C.

RICHARD N. WOODLEY, APPLICANT; THE COUNTY
COUNCIL OF THE COUNTY OF CORK, RESPON-
DENTS (1).

Appeal.
1909.

Dec. 10, 13.

*Malicious injury—Heather—Burning of—Malice—10 Wm. 3, c. 8, s. 7—
24 & 25 Vict. c. 97, s. 16—61 & 62 Vict. c. 37, s. 5.*

K., the owner and occupier of lands adjoining those of the applicant, set fire to the heather on his own lands at a date prohibited by statute. The fire spread to and injured the lands of the applicant, which was the natural and probable consequence of the act of K., who, however, had no intention of injuring the lands of the applicant:—

Held, that as the act of K., though illegal, was, on the evidence, not malicious, and was not accordingly a crime punishable on indictment under the Malicious Damage Act, 1861, the applicant was not entitled to compensation under section 5 of the Local Government (Ireland) Act, 1898, in respect of the injury done to his lands.

CASE STATED by Johnson, J., at the Summer Assizes, 1909, for the County of Cork (West Riding) as follows:—

“This was an appeal from a decree for £20 for malicious injury that was listed for hearing before me at the Cork Summer Assizes, 1909. The facts were agreed upon as follows:—

“(1) The applicant was, and is, the owner and occupier of certain lands at Deelish, in the county of Cork. The said lands are bounded by part of the lands of Kilherribert, of which one Patrick Kelleher was, and is, the owner and occupier.

“(2) Upon the 23rd April, 1908, in contravention of the statutes 10 Wm. 3, c. 8, and 27 Geo. 3, c. 35, the said Patrick Kelleher fired the heather upon his (Kelleher's) own lands for the purpose of improving the grazing thereon.

“(3) The boundary between the lands of the applicant and the lands of Patrick Kelleher was only a small water-course, overgrown with heather, and it was the natural and probable

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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consequence of the act of firing Kelleher's heather that the fire would spread to the applicant's lands; but it was not the intention of Kelleher that the applicant's lands should be burned, or injury done to them.

"(4) The fire, in fact, did spread to the applicant's lands, and caused injury to the applicant's lands amounting to £20. The County Court Judge granted a decree for £20, against which the County Council of the County of Cork appealed.

"The question for the decision of the Court of Appeal is, whether upon the evidence the injury occasioned by the act of the said Patrick Kelleher was a criminal injury within the meaning of the Acts relating to the same?"

Conner, K.C., and J. E. Walsh, for the appellants:—

The applicant is not entitled to compensation. No doubt the act of Kelleher in setting fire to the heather on his lands on the date in question was illegal under section 7 of 10 Wm. 3, c. 8; but his act, unless malicious, was not a felony nor a crime "punishable on indictment under the Malicious Damage Act, 1861" (see section 5 of the Local Government (Ireland) Act, 1898). Sections 16 and 51 of the Malicious Damage Act, 1861, deal, respectively, with unlawful and malicious acts. Here the finding of Johnson, J., is, that Kelleher did not intend to burn, or injure, the applicant's lands. His act was, therefore, not a felony punishable on indictment, and the only penalty he incurred was a fine on summary conviction before the magistrates. To constitute arson at Common Law, the burning must be both malicious and wilful: see Russell on Crimes (1909 ed.), vol. ii., p. 1776.

In *Tyrone County Council v. Trustees of Ogilvy* (1) and *Dunalley v. County Council of Tipperary* (2) the acts occasioning injury to the applicants were *prima facie* malicious, and there was no finding by the Court to the contrary.

[They referred to *In re Borrowes* (3) and *James v. Phelps* (4).]

(1) 35 Ir. L. T. R. 242.

(2) 39 Ir. L. T. R. 184.

(3) [1900] 2 I. R. 593.

(4) 11 A. & E. 483.

A. M. Sullivan, K.C., and *J. F. Moriarty*, for the respondent:—

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The act of Kelleher was, in law, malicious; it was admittedly an illegal act, having regard to the date of its commission; and the case finds that the natural and probable consequence of the act was that the fire should spread to the applicant's lands. In *Reg. v. Pembliton* (1) Blackburn, J., laid down that the jury might have found on the evidence that the act was malicious, "because they might have found that the prisoner knew that the natural consequences of his act would be to break the glass; and although that was not his wish, yet that he was reckless whether he did it or not." In *In re Borrowes* (2) there was no intention to break the mirrors; yet the injury was held malicious. In *Tyrone County Council v. Trustees of Ogilvy* (3) there was no finding of malice by the judge; *M^d Dowell v. Corporation of Dublin* (4).

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[They also referred to *Reg. v. Martin* (5) and *Reg. v. Dixon* (6).]

Conner, K.C., in reply.

THE LORD CHANCELLOR:—

Nov. 13.

I am of opinion that on the special findings of the judge who has submitted this case to us, a claim for compensation by the applicant for the burning of heather on the lands of Deelish cannot be sustained against the County Council under the Malicious Injury Compensation Code. [His Lordship read the facts as stated *supra*.]

It is not contended that the claim could be sustained under the Grand Jury Act of 1836; but it was argued that the heather was property within the meaning of the extending provisions of the Local Government Act, 1898, section 5, sub-section 1, and that the proviso at the end of that sub-section limiting its operation to cases "where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861," was in this case satisfied. [His Lordship referred to section 16 of the

(1) L. R. 2 C. C. R. 119.

(4) [1903] 2 I. R. 541.

(2) [1900] 2 I. R. 593.

(5) 8 Q. B. D. 54.

(3) 35 Ir. L. T. R. 242.

(6) 3 M. & S. 11.

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Malicious Damage Act, 1861.] The material words are "unlawfully and maliciously."

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In the present case it is conceded that the act of Kelleher of burning the heather on his own land on the 23rd April, 1908, was an unlawful act, having regard to the date of its committal; and the claimant, therefore, has established, so far, one of the tests required by the 16th section. The question remains, whether it was also done "maliciously," having regard to the special finding in the case stated in reality by the Lord Chief Baron, though in form it came to be stated by Mr. Justice Johnson by reason of the adjournment.

The Chief Baron expressed an opinion against the claim; but he has reserved to us the question, "whether, upon the evidence, the injury occasioned by the act of the said Patrick Kelleher was a criminal injury within the meaning of the Acts relating to the same."

We were during the argument referred to decisions of this Court in which we had to consider the legal effect of those words "unlawfully and maliciously" in the particular cases under discussion.

The first in date was *In re Borrowes* (1). The act there which caused the injury to the claimant's mirrors was the voluntary and intentional act of the boy. In trying to get out of the window, he unintentionally caught his foot in sheets which covered the mirrors, and therefore, as found, "without attempting to free his foot gently without injuring the mirrors he wilfully and intentionally kicked out with reckless violence to free his foot, knowing that the probable result of his struggle would be to injure the mirrors, and not caring whether he injured them or not." The test applied was that, on an indictment for unlawfully and maliciously injuring the property, a Judge at the trial might tell the jury that the facts found on that case were evidence of malice on which they ought to convict. They were the clearest evidence of a wrongful act, done intentionally or with a reckless disregard of the consequences.

The other case was *M'Dowell v. Corporation of Dublin* (2). There a thief broke a window in a shop, with the primary object

(1) [1900] 2 I. R. 593.

(2) [1903] 2 I. R. 541.

of getting at and stealing some silver plate inside. We were all of opinion that, as the act was an unlawful act, intentionally done, and calculated to injure another, it was malicious. I find I referred to the dictum of Lord Blackburn, that "a man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another." The fact that he had no ill-will against the owner of the property was quite immaterial. So far the decisions support the claimant's case.

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But we must deal with and apply section 3 of the finding, which contains in effect two material statements. (1) "It was the natural and probable consequence of the act of firing Kelleher's heather that the fire would spread to applicant's lands." If that was the whole finding, there would, I think, have been ample evidence for a jury to convict Kelleher of having done the act maliciously. The finding, however, goes on: "but it was not the intention of Kelleher that applicant's lands should be burnt and injury done to them." The presumptive evidence of malice is, I think, displaced by that finding. The case of *Reg. v. Pembliton* (1) is, I think, a direct authority on this point.

There the prisoner was indicted at Quarter Sessions for that he "unlawfully and maliciously did commit damage, injury, or spoil upon the window in the house of Henry Kirkham," contrary to the provisions of the statute 24 & 25 Vict. c. 97, sect. 51. It appeared that on the night the damage occurred the prisoner was drinking with others at Kirkham's public-house. At 11 o'clock, p.m., all of them were turned out for being disorderly. They began to fight in the street, near a window of the house. The prisoner picked up a large stone and threw it at the persons he had been fighting with. It passed over their heads and struck the window. The jury found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window. The Court for Crown Cases Reserved held that the conviction should be quashed on the ground that there was not, having regard to the finding of the jury, a "wilful doing of an intentional act," as required by the statute under which the prosecution was brought.

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The finding in the case stated seems to me, in effect, the same as the special finding of the jury in *Pembliton's Case* (1).

I am of opinion that we must answer in the negative the question reserved for us.

HOLMES, L.J. :—

Mr. Woodley is the owner and occupier of certain lands in County Cork adjoining lands owned and occupied by Patrick Kelleher, who, on the 23rd April, 1908, set fire to the heather on his own lands for the purpose of improving the grazing thereon. The fire spread to Mr. Woodley's lands, and caused injury thereto to the amount of £20, for which he made a claim on the County Council on the ground of malicious injury. The result of the claim depends upon whether Kelleher, in setting fire to his own heather, was guilty of a crime under section 16 of 24 & 25 Vict., c. 97. If he was, the applicant is entitled to compensation; but if not, his claim must be dismissed. The section declares that whosoever shall "unlawfully and maliciously" set fire to any heath, gorse, furze, or fern, wherever the same may be growing, shall be guilty of felony.

For a man to burn the heather on his own land at the time of year when this fire took place, is made illegal by an old Irish statute; and as it was the act of Kelleher that caused the injury to the applicant, there is, I presume, no doubt that damages for the loss could be recovered from him in a civil action. The question, however, is, was his act malicious and therefore criminal? It is, I think, well settled that the meaning of the word "maliciously" in the 16th and other sections of the same statute is not confined to cases in which the illegal act arises from a feeling of spite or ill-will against the injured party. On this point I have nothing to add to what has been already said by the Lord Chancellor and myself in *M'Dowell v. Corporation of Dublin* (2). Whether in the present case Kelleher acted maliciously within the meaning of the Malicious Damage Act, 1861, depends on what is found in the case stated; and I fear that our present

(1) L. R. 2 C. C. R. 119.

(2) [1903] 2 I. R. 541.

decision will give but little help in other cases. Starting with the fact that Kelleher's act in burning his own heather was illegal, I find in the case stated that the natural and probable consequence of the act of firing his own heather was, that the fire would spread to the applicant's land. Adopting the proposition quoted by the Lord Chancellor in *M'Dowell's Case* (1) from Stephen, J., and Lord Blackburn, I hold that "a man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another," and I am also prepared to hold that in the absence of evidence to the contrary, a man is to be presumed to know the natural and probable consequences of his own act.

Therefore, if there was no other fact found, I should decide in favour of the applicant on the ground that the case stated shows malice. But there are added the words: "It was not the intention of Kelleher that the applicant's lands should be burned or injury done to them." The only inference I can draw therefrom is, that the Judge, on the evidence, was satisfied that Kelleher did not know what would be the natural and probable consequence of his act, that therefore the injury to the applicant was not intentional, and consequently not malicious.

For these reasons, I answer the question submitted to this Court in the negative.

CHERRY, L.J. :—

The applicant for compensation in this case is the owner and occupier of certain lands in the County of Cork, immediately adjoining those of one Patrick Kelleher, the two holdings being separated only by a small watercourse overgrown with heather.

Kelleher, with the innocent purpose of improving the grazing upon his own land, on the 23rd April, 1908, set fire to the heather thereon; the fire spread, as was natural, to the adjoining lands of the applicant, and caused injury thereto to the amount of £20, as found by the learned County Court Judge.

The act of firing his own lands, having been done during a prohibited period of the year, was, on Kelleher's part, an unlawful

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and criminal act, quite irrespective of the injury done to his neighbour, inasmuch as it was in contravention of the statutes 10 Wm. 3, c. 8, and 27 Geo. 3, c. 35. The question for our consideration is, whether the injury occasioned to the claimant's land by the act of Kelleher was a criminal injury within the meaning of the Malicious Damage Act (24 & 25 Vict. c. 97). If it was, the applicant is entitled to compensation; otherwise he is not.

The learned Judge who has stated the case has found upon the evidence that although it was the natural and probable consequence of the act of firing Kelleher's heather that the fire would spread to applicant's land, yet it was not the intention of Kelleher that applicant's lands should be burnt or injury done to them.

Upon this finding I am of opinion that Kelleher's act was not a malicious injury to the applicant, and that the latter is not entitled to compensation.

It was argued on behalf of the applicant that a man who does an unlawful act, the natural consequence of which is injury to another, must have imputed to him the intention to injure, and malice towards, the person injured. I cannot concur in this statement of the law. Of course, under the circumstances stated, the intention to injure, and malice, *may* be imputed to the person who does the unlawful act, even though his motive be perfectly innocent; but I think it is a question of fact to be determined in each case whether such intention or malice is or is not to be so imputed.

I cannot see any distinction in principle between this case and *The Queen v. Pembrton* (1). There a man was indicted for malicious injury to property under 24 & 25 Vict. c. 97, section 51. It was proved that he had been fighting with persons in the street, and threw a stone at them, which passed over their heads and struck a large plate glass window in the prosecutor's house beyond. The jury found that he threw the stone, intending to strike one of the people, but not intending to break the window, and it was held by all the Judges that under these circumstances he could not be convicted of malicious damage, although the natural consequence

of his act was clearly to break the window. "The jury might perhaps have found," says Blackburn, J., "on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do."

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Co. COUNCIL.
Cherry, L.J.

These remarks of Lord Blackburn apply as much to the present case as to that which he was at the time deciding, and I can see no inconsistency between our decision against the applicant in this case and any of the cases which have been cited to us. The case of *In re Borrowes* (1) was much relied upon in support of the claim; but what was the finding of fact there? I quote from the judgment of Fitz Gibbon, L.J., at p. 600: "The learned Judge finds that the breaking of the mirrors was malicious, almost in the words of the judgments in *Reg. v. Pembilton* (2). He finds that the boy's freeing his foot was not done gently and without intention to injure, but by wilfully and intentionally kicking out with reckless violence, knowing that the probable result would be to injure the mirrors, and not caring whether he injured them or not." This is a finding the very opposite of that in the present case, and merely an application of the principle laid down by Lord Blackburn, and quoted with approval by Walker, L.J., in *M'Dowell v. Corporation of Dublin* (3), that "a man acts maliciously when he wilfully, and without lawful excuse, does that which he knows will injure another." This proposition was also the basis of the decision in *The Queen v. Martin* (4), as appears from the judgment of Stephen, J., at p. 58.

All these cases are therefore, in my opinion, not only consistent with, but direct authorities for, our present decision. Even the two circuit cases which have been referred to—*Tyrone County Council v. Trustees of Ogilvy* (5), and *Lord Dunalley v. County*

(1) [1900] 2 I. R. 593.

(2) L. R. 2 C. C. R. 119.

(3) [1903] 2 I. R. at p. 550.

(4) 8 Q. B. D. 54.

(5) 35 Ir. L. T. R. 242.

Appeal. *Council of Tipperary* (1)—are not. I think, necessarily inconsistent
 1909. with it, for although the facts were very similar to those in the
 WOODLEY present case, there does not appear to have been in either of them
 v. a distinct finding of absence of intention, as distinct from desire,
 CORK a distinct finding of absence of intention, as distinct from desire,
 Co. COUNCIL. to do the injury for which the compensation was claimed; and
 Cherry, L.J. for all that appears in the reports of the cases, the learned Judge
 may have held, in each of them, that the person who set fire to the
 heather knew, and recklessly disregarded, the natural consequences
 of his act.

I agree that the question in the case must be answered in
 the negative.

Solicitor for the appellant: *C. W. Ashe.*

Solicitors for the respondents: *Exham & Son.*

R. ST. J. C.

Appeal. THE KING (WILLIAM MAHONY) *v.* THE JUSTICES
 1909. OF THE COUNTY OF CORK (2).

June 18, 21.

*Justices—Order—Summons—Permissive occupancy—Landlord and Tenant
 (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 86.*

In proceeding under section 86 of the Landlord and Tenant (Ireland) Act, 1860, to recover possession from a permissive occupier, it is unnecessary, either in the complaint or in the order of the Justices, to distinguish the precise character of the occupation, viz., whether the occupier is in occupation as servant, or herdsman, or caretaker, or otherwise permissively, specifying the precise character of the occupation. Where the complaint stated that the occupation was as "hired servant or caretaker," and the Justices simply gave an order for possession:—

Held, reversing the decision of the King's Bench Division, that the order was valid *ex facie*.

APPEAL by Mrs. Sarah Beamish, the complainant in the summons hereinafter mentioned, from an order of the King's Bench Division, dated the 10th May, 1909, making absolute a conditional order of *certiorari*.

(1) 39 Ir. L. T. R. 184.

(2) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

On the 13th January, 1909, the complainant (Mrs. Beamish) issued the following summons against William Mahony, the respondent (prosecutor in the application for *certiorari*):—

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1909.

SARAH BEAMISH, of Carrigrennan,
Little Island,

Complainant;

WILLIAM MAHONY,

Defendant.

PETTY SESSIONS DISTRICT OF
DRIMOLEAGUE, COUNTY OF CORK.

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(MAHONY)
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CO. CORK.

Whereas a complaint has been made to me, that within the above district and county defendant is required to show cause why an order should not issue for recovery of possession of a dwelling-house and premises on the lands of Molnaskeha, within the above Petty Sessions District and County, into which he was put by complainant, being the owner thereof, as her hired servant or caretaker, and the possession of which has been demanded and refused.

This is to command you to appear, &c.

The case was heard before the Justices at Drimoleague Petty Sessions on the 18th January, 1909, when evidence was given by the complainant showing that the defendant was put into possession of the premises in question as a farm labourer and caretaker; and by the defendant showing that he was a yearly tenant, at the yearly rent of £3 10s., and that a *bona fide* question of title arose, ousting the jurisdiction of the Justices.

As the present report is only conversant with the form of the order made at Petty Sessions upon the summons, it is not necessary to give the details of the evidence.

Upon the hearing of the complaint on the 18th January, 1909, the following order was made by the Justices:—"Decree to possession in not less than seven nor more than fourteen days. Warrant to John Kelly."

A conditional order, dated the 1st April, 1909, was obtained by William Mahony in the King's Bench Division, to bring up, for the purpose of being quashed, the said order of the 18th January, 1909, upon the grounds, *inter alia*, that the order was bad on its face and void for uncertainty. Mrs. Beamish showed cause, and upon hearing the arguments a Divisional Court (Palles, C.B., and Johnson, J.), on the 10th May, 1909, quashed the order, both upon the ground above stated, and also because they were of opinion that, upon the evidence, a *bona fide* question of title arose.

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Mrs. Beamish appealed.

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(MAHONY)

v.
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CO. CORK.

P. D. Fleming, K.C., and W. H. Brown, for the appellant:—

The question of law raised in the conditional order is, whether it is essential to the validity of an order at Petty Sessions under section 86 of the Landlord and Tenant (Ireland) Act, 1860, that it should specify on its face, or by reference to the summons, whether the person in occupation is so as servant, herdsman, or caretaker, stating the particular capacity in which he occupies, or whether the form of summons here was sufficient to ground an order merely for possession. We submit that there are two classes of occupation referred to in section 86: (a) occupation under a tenancy defined by section 81 as a cottier tenancy; (b) a permissive occupation of any of the three kinds described. The distinction drawn in the section is between occupation in its character that of a tenant—though merely of a cottier description—and occupation of a permissive kind, of which there may be many, and of which three are mentioned as illustrations. If the defendant was not a cottier tenant, the description in the summons was quite specific and certain enough, and would support the order made at Petty Sessions: *Reg. (Byrne) v. Knox* (1); *Reg. (O'Leary) v. Justices of Cork* (2); *Ex parte Vaughan* (3); *R. v. Bolton* (4); *White v. White* (5); *R. (Loughran) v. Justices of Louth* (6).

George M'Sweeney, for William Mahony:—

Every order of a Court of inferior jurisdiction must show jurisdiction on its face: *Molloy, Justice of the Peace*, pp. 221, 227; *Reg. v. Campbell* (7); *Fitzpatrick v. Pine* (8); *Cotterill v. Lempriere* (9); *R. (Moore) v. Justices of Wexford* (10); *Ex parte Bradlaugh* (11).

W. H. Brown, in reply, cited Smith v. Perry (12).

(1) 22 L. R. Ir. 599.

(2) 12 L. R. Ir. 167.

(3) L. R. 2 Q. B. 114.

(4) 1 Q. B. 66.

(5) [1906] A. C. 72.

(6) Unreported.

(7) 3 Ir. C. L. R. 586.

(8) 13 Ir. C. L. R. 32.

(9) 24 Q. B. D. 634.

(10) 37 Ir. L. T. R. 64.

(11) 3 Q. B. D. 509.

(12) [1906] 1 K. B. 262.

[Counsel on both sides also discussed the evidence very exhaustively.]

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CO. CORK.

June 21.

THE LORD CHANCELLOR:—

There are two questions in this case—one arising on the construction of the Act 23 & 24 Vict. c. 154, s. 86, and the other on the facts. As regards the second point there is a difference of opinion between the members of the Court; but, so far as regards the first question, namely, the alternatives, “servant, herdsman, or caretaker,” we are all of opinion that there are two classes to which the section applies: first, a cottier tenancy, which does not arise here; secondly, the class of permissive possession, as servant, herdsman, or caretaker. I think this group of permissive occupiers is used in contrast to a cottier tenancy.

The Justices are, on proof before them of the holding or permissive possession, as the case may be, and of its end or determination, and the time and manner thereof, to issue the warrant. Here “holding” is out of the case, and I think “permissive possession” is sufficiently met by the words “servant, herdsman, or caretaker,” each of which is a case of permissive possession.

FITZ GIBBON, L. J.:—

In my opinion, on the words of section 86, the alternatives, one or other of which must be proved, is between a cottier tenancy and a permissive possession. The magistrates jurisdiction arises “on proof being made before them of the holding or permissive possession, as the case may be”: 23 & 24 Vict. c. 154, section 86.

I can not hold with the Lord Chief Baron, that to show jurisdiction it must not only be shown on the order that the magistrates have determined that the possession is permissive, but it must also be specified whether the occupant was a servant, a herdsman, or a caretaker. A herdsman is usually a servant, and a servant may be a caretaker. In speaking of these three capacities “or” seems to me to mean “*aliter*,” and a finding of permissive possession in any one or more of them upon sufficient evidence is, I think, sufficient.

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HOLMES, L. J. :—

On the first point I agree with the judgments of the Lord Chancellor and Lord Justice Fitz Gibbon, which are in accordance with the statute. There are two cases in which the magistrates can give orders for possession—one, cottier tenancies, and the other, permissive occupancy; and although there are three kinds of permissive occupants mentioned, it appears to me that these are given merely as examples of permissive occupants: it is simply enumerating different kinds of occupancy. It is plain that the order of the Justices was based on the existence in this case of permissive occupancy; and under the circumstances I think there was no duplicity in the order.

Solicitor for the appellant: *P. J. Collins.*Solicitor for the respondent: *J. H. Powell.*

W. G.

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O'REILLY v. McCALL (1).

(1907. No. 10,399.)

Feb. 17-19.

Appeal.

May 7.

H. L.

1909.

Dec. 8.

Unsatisfactory trial—Master and Servant—Scope of employment—Accident—Contributory negligence—Amendment of pleadings—Jury finding against the uncontradicted evidence of a single witness upon issue going to root of case—Bias of juror—New trial—Entering verdict and judgment for party against whom jury found.

The plaintiff's husband was killed by a motor-car, the property of the defendant, and driven at the time by W., who was defendant's chauffeur. There was much contradictory evidence as to the negligence of W. and the contributory negligence of the deceased; but upon this the verdict, if given by an unbiassed jury, could not admittedly be disturbed. The main defence, though not specifically raised by pleading, was that W. was not, at the time of the fatal occurrence, acting within the scope of his employment as the defendant's chauffeur. On this question he was the only witness produced, the defendant himself being in Egypt for health's sake. W.'s evidence was

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

to the effect that on the day in question, while driving the defendant from Leopardstown races to a restaurant in Dublin, they met a broken-down car, and took its occupants to Dublin. At the restaurant the defendant directed W. to take these persons to their home at Ratoath, and then to drive to defendant's place at Castleknock. On leaving Ratoath, instead of going to Castleknock, as ordered, W. drove in the car to visit his wife at Ringsend, where he stopped for five minutes, and returned to Castleknock, in the course of which return the accident happened. There was nothing on cross-examination, or otherwise, to throw doubt on W.'s veracity, and there was no evidence to contradict him. The Judge at the trial refused to allow the pleadings to be amended so as to specially raise the question whether W. was acting within the scope of his duty when the accident occurred; but he left that question to the jury, who found in the affirmative. The Judge reported that one of the jurors appeared to have formed an opinion in the course of the trial very favourable to the plaintiff.

The jury found for the plaintiff on all the questions submitted to them.

The King's Bench Division having set aside the verdict, and directed a new trial, on the ground that the trial was unsatisfactory; and the Court of Appeal having directed a verdict and judgment to be entered for the defendant:—

The House of Lords reversed the decision of the Court of Appeal, and restored that of the King's Bench Division, directing a new trial.

ACTION by the plaintiff under Lord Campbell's Act, claiming damages for the death of her deceased husband, Michael O'Reilly from, as was alleged in the statement of claim, "the negligence of the defendant's servant in and about the care and management of a motor-car."

The particulars alleged that the defendant's servant, Robert Whittaker, while in charge of defendant's motor-car, and in course of his employment as defendant's servant, drove the said car along Wood Quay on the 24th August, 1907, (a) negligently, (b) furiously, (c) recklessly, (d) at an unreasonable pace, considering the surrounding circumstances; (2) failed to sound his horn when approaching crossing at Wood Quay; (3) was not driving at the proper side of the road; (4) failed to exercise due or reasonable care.

The defence was a denial of any negligence by the defendant or his servant, and alleged contributory negligence by Michael O'Reilly.

The particulars of the alleged contributory negligence were, that Michael O'Reilly, despite of warnings by horn, human voice,

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K. B. Div. 1908. and flash of light by the car, rushed deliberately across the path of the car when it was impossible to avoid collision with him—
O'REILLY that he did not keep a proper look-out—and that he stopped
v. on the roadway while crossing the road, and by so stopping
McCALL. invited the chauffeur to go on, and when the car had begun to move on, suddenly rushed across its path, rendering a collision inevitable.

Reply—Joinder of issue and that, if there was any contributory negligence, defendant could by reasonable care have avoided the injuries complained of.

In answer to interrogatories, the defendant admitted that on the 24th of August, 1907, Robert Whittaker was in his employment as chauffeur, but alleged that when the accident occurred he was returning from a journey to see his wife at Ringsend, which journey was undertaken by him without any authority direct or indirect from the defendant and entirely upon his own account.

The action was tried in Dublin before Andrews, J., and a city special jury on the 23rd and 24th January, 1908.

His Lordship's report of the trial was as follows :—

The following are the questions I left to the jury, with their answers thereto :—

1. Was Robert Whittaker on the occasion in question the servant of the defendant? Yes.
2. Was Robert Whittaker at the time of the occurrence, when driving the motor-car, acting as the defendant's servant within the scope of his employment? Yes.
3. If so, was the defendant by his said servant guilty of negligence in the management of the motor-car at the time of the occurrence? Yes.
4. If so, was such negligence the real, direct, and immediate cause of the injuries which occasioned Michael O'Reilly's death? Yes.
5. If you find for plaintiff, assess the damages? £150.

The jury apportioned the £150 thus :—

£130 to the plaintiff.

£20 to Patrick Martin, stepson of deceased.

I gave judgment for the plaintiff for £150 and costs, accordingly, with the extension of the defendant's time to move, and the stay of execution set forth in the Registrar's Certificate, upon the terms therein mentioned.

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The following evidence was given for the plaintiff:—

Edgar Anderson, Civil Engineer, examined. Made and proved map of the locality where the occurrence took place. Red spot (marked) where it was pointed out to the witness that the body of deceased was found. Distance—Red spot to kerb of footpath on the riverside, 29 feet; to kerb of opposite footway, 35 feet, 5 inches; to Winetavern Street Bridge, 87 feet; to where Essex Quay joins Wood Quay, 285 feet; to fireman's box on Wood Quay, 258 feet; to urinal, measured along centre of road, 114 feet. (The direction in which the car was going was from Essex Quay towards the Phoenix Park.)

Mary O'Reilly, the plaintiff, examined—"I was married to Michael O'Reilly, the deceased, in 1888. He was then in the employment of the Corporation, and worked in it for a short time afterwards. He was killed on a Saturday night (24th August, 1907). I saw him dead in Steevens's Hospital on the following Monday morning. He was 45 years of age." [Witness then gave evidence as to her late husband's earnings.]

Mrs. Elizabeth M'Connell examined (gave her evidence somewhat volubly and vehemently)—"I remember the night of the 24th August last. I was on the bridge opposite Winetavern Street, going towards my home, off Bride Street; my way would be up Winetavern Street, and I had to cross the bridge. I stood on the bridge and looked up and down to see if any cars were coming before I crossed. It was about twenty minutes or half-past ten o'clock, p.m. I saw this motor-car flying as quick as ever it could. I stood at the corner of the bridge on the footpath. I saw a man cross the street from the houses side towards the river side. The motor-car was flying quick and dashed the man down. It was going as quick as ever it could. I mentioned the Blessed Name and screamed. I heard no motor horn sounded, nor any warning given, and I got a weakness."

Andrew Reddin examined—"I am a watchman of the Dublin Corporation. I remember the night of the 24th August last.

K. B. Div. My box was between the urinal and Winetavern Street Bridge.
 1908. I was there on duty. I saw the motor-car coming along between
O'REILLY 10 and 11 o'clock. It was coming from the direction of Grattan
v. Bridge, and going towards Kingsbridge. I was facing towards
McCALL. Grattan Bridge, and had a full view of the motor-car. I saw it
 first when it just passed Grattan Bridge. No vehicle was in
 front of it. It had a clear run. It was a fine, dry night. Wood
 Quay is well lighted with electric lights. It was coming pretty
 lively—faster than any outside car. I heard no horn or gong
 sounded. If sounded, I must have heard it. I was not deaf at
 the time. I heard someone scream, 'Look out! look out! look
 out!' I got out of my box and saw a man lying on the ground,
 and the motor-car stopped and three men lifted him into it. The
 man was lying in the space between the two tram-tracks."
 [Mr. Moriarty, K.C., counsel for the defendant, said there was
 no dispute as to where the man was lying.] Cross-examined—
 "I did not see him knocked down. I know Wood Quay very
 well. The car was up near Winetavern Street Bridge. I went
 up to where he was knocked down and I saw him lying on the
 ground, and four men lifting him into the motor from between
 the two tram-tracks. The motor-car was stopped and standing
 near him, and a little beyond him." [The witness was referred
 to his evidence before the magistrate as follows, and said it was
 correct.] "The car was beyond him a bit—a yard—in the direction
 in which it was going. It was beside him, and they were lifting
 him in. I saw the motor-car first when it was at Grattan Bridge.
 I did not keep looking at the car after it passed me. It passed
 my box about twenty yards on this side of the urinal, and was
 then stopped and the man was lifted in. It was [occurred] in a
 very short time. I heard the shout and went out. It was after
 the car passed me that I heard 'look out!' called three times."
 Re-examined—"My box faced Grattan Bridge. I could see the
 motor standing when I got out of my box. I got out when I
 heard 'look out!' I don't walk fast. I have only one leg."

Martin Moran examined—"I am constable 144 A. I was
 on duty at Usher's Island on the 24th August. I saw a motor-
 car coming down the Quay between 10 and 11 o'clock p.m. Six
 or seven men were in the motor. I know Robert Whittaker."

[Points to him in Court.] "He was driving the motor-car. The number was I K 315. The deceased was in the car at the time. I took him in the motor to Steevens's Hospital. Whittaker made a statement to me. It is not in my note-book. I had no note-book." [Gives the statement without objection.] "He said he was driving along the Quays at the rate of six or eight miles an hour. That he saw a man cross the road. The man was about forty yards in front of him, when he saw him cross the road. That he was crossing from the houses side towards the river. As soon as he saw him he sounded the horn four or five times. That he (the man) seemed to have heard the horn—that he stopped, and when he (Whittaker) came near him he (Whittaker) so swerved the car to the right and then to the left in order to avoid him, that the right front mudguard hit him about the hip and knocked him down. He (Whittaker) told me he was going to Castleknock with the car. It is outside the Phoenix Park. This (what Whittaker told him occurred) was outside the Irish House." Cross-examined (the deposition of the witness referred to). "He said he was going very slow—about four miles an hour, when the man was knocked down. He said he stopped the car at once and took the man into it. The man stopped and then made a dive to cross the Quay, and he (Whittaker) then made a swerve to the right and then to the left. Whittaker was perfectly sober and correct. He came to the hospital with me. He gave me his name and address—Robert Whittaker, 9 Brighton-terrace, Ringsend." To a juror—"I did not hear the horn sounded. I was a good bit away from where the accident occurred."

Charles D. Mockler, Inspector of the Dublin Metropolitan Police, examined—"I visited Chancery Lane Police Station between 11 and 12 o'clock, p.m., on the 24th of August last. I saw a motor-car there I K 315. I noticed the condition of the right front mud-guard. Immediately in front the edge of it was bent down about an inch, and about 12 or 14 inches back from that there was a deep bend or buckle in it like this." [Shows the bend with his hands.] "The front part of it is about hip-high. I saw the lamps, four in front, two large brilliant lamps immediately in front, and two others in front of the chauffeur's seat. I was pointed out the locality of the accident, the approximate spot where it occurred,

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K. B. Div. by Reddin, and I pointed it out to Mr. Anderson afterwards. It
 1908. was between the two sets of tram-rails. I saw the man dead at
O'REILLY the hospital on the next day, Sunday, at 1 o'clock a.m." Cross-
v.
McCALL. examined—"I could not say what the mud-guard is made of. Robert Whittaker was perfectly sober. The car was well lit up." To a juror—"I did not see the accident. The car was lighted up at Chancery Lane." To counsel—"The lamps gave exceedingly brilliant light."

Richard Gordon examined—"I was House-Surgeon at Stevens's Hospital in August last. I saw Michael O'Reilly about half an hour after he was brought in. He was unconscious. He died between 12 and 1 o'clock a.m. There was no smell of drink, nor anything to lead me to believe that he had drink taken. There was an inquest on the following Monday. I made a *post-mortem* examination. The cause of his death was fracture of the skull—a very extensive fracture. It might be caused by his being thrown with violence against the ground. His organs were sound and healthy." [His deposition referred to by Mr. Moriarty, in which the witness stated that Michael O'Reilly died at 11.30 o'clock that evening.] The witness—"That is more correct."

[It was admitted that at the time in question the motor-car was the defendant's, but he was not then in it.]

Interrogatory No. 1 to the defendant read:—"Was Robert Whittaker in the service of the defendant on 24th August, 1907?" Answer thereto read:—"The said Robert Whittaker was in my service on the 24th August, 1907."

It had been stated, and was not contested, that the defendant's residence was, The Farm, Castleknock.

Mr. Lynch, K.C., for the plaintiff, closed her case.

Mr. Moriarty, K.C., for the defendant, asked me to direct a verdict for the defendant on the following grounds:—

1st. That there was no evidence of negligence.

2nd. That a master was only liable for the acts of his servant when acting within the scope of his employment, and that the onus was on the plaintiff of showing that when an injury is alleged to be due to the negligence of the defendant's servant, the servant was acting within the scope of his employment.

That it was proved that the deceased was knocked down by a motor-car, which at the time belonged to the defendant; that Robert Whittaker was at the time in his service, and was driving the car on the occasion in question; but it was not proved that he was, on the occasion in question, either authorized to drive the car, or was acting within the scope of his employment, and he was alone in the car when the man was knocked down; and Mr. Moriarty cited the case of *Beard v. The London General Omnibus Company* (1) as conclusive in favour of the second ground of his application for a direction.

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Mr. Lynch, for the plaintiff, opposed the application for a direction on both grounds, and as to the second ground contended that it was not open on the pleadings, and referred to cases in the note to Bullen and Leake (edition of 1868), page 701, including *Hart v. Crowley* (2) and *Dunford v. Trattles* (3); and he further contended that the evidence showed that the car was the defendant's, that Whittaker was his servant, and was in charge of it, and was driving it in the direction of his master's (the defendant's) residence at Castleknock.

Mr. Moriarty contended that the authorities referred to by Mr. Lynch did not apply; but asked leave to amend by adding a defence directly raising the question of whether Whittaker, at the time of the occurrence, was acting within the scope of his employment.

I declined to give leave at that stage of the case to add this defence, and said that, irrespective of the question of pleading, I thought there was evidence to go to the jury on both grounds.

I also thought that, as the case stood on the pleadings and evidence, the jury should have the evidence of Robert Whittaker, who was in Court. Mr. Moriarty then asked me to take a note that he offered to pay the costs of the day, and have the trial adjourned for a week, and pay any costs incurred by the adjournment, if I gave leave to add at that stage the further defence referred to. I declined, but said I would receive any evidence on the question, including Whittaker's, which might be offered on behalf of the defendant.

(1) [1900] 2 Q. B. 530. (2) 12 Ad. & Ell. 378. (3) 12 M. & W. 530.



K. B. Div. Mr. Moriarty then stated the defendant's case, and said the
1908. defendant had been obliged to go abroad, and could not be
O'REILLY produced, but that Whittaker could be examined.

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McCALL. The following evidence was then given on behalf of the
defendant:—

Robert Whittaker examined—"I am a licensed driver of motor-cars. I was in the service of Mann & Overton, of Lincoln Place, Motor Engineers, and am now in the service of Robinson & Smith, King Street. I had been driving motor-cars for seven years before the 24th of August last. I had driven thousands of miles, and never met with an accident. I am a teetotaler. I had been engaged for seven days by Mr. McCall, the defendant, starting on the 24th of August, to drive his motor-car. On that 24th of August I had driven Mr. McCall and a friend of his to the Leopardstown races. In the evening I drove them back towards Dublin. I know Foster Avenue. I saw a motor-car there broken down at the corner of the road. By the defendant's directions I got out to see if I could assist. I found it would take some time to fix up this motor-car; and then the defendant invited the two gentlemen who were there into his car, and directed me to drive to Dublin. Four were then in the car, and I was driving. I came on to town, and first went to Rover Garage, in Suffolk Street. It was closed. I went then to Hutton's, in Summer Hill. It was closed too. I was then directed by the defendant to go to Jammet's restaurant, in Suffolk Street. I left the defendant and his friend at Jammet's, where they got out. The two gentlemen we brought from Foster Avenue remained in the car. The defendant told me he was going to let these gentlemen have the car to take them home, if they wished it; but that I was first to go to Foster Avenue to see if I could do anything for them at their own car, and if not to take them home, and when I left them home at Ratoath to drive to Castleknock. I went out to Foster Avenue. I could not repair the motor-car that was there, and I took the two gentlemen home to Ratoath. I had to pass Castleknock. When I left them at Ratoath, I came back by Blanchardstown and Castleknock. Instead of stopping at Castleknock, I came on to Dublin and went to Ringsend, to 9 Brighton Terrace, where I lived and where my wife was living. I stopped at

my house about five minutes, and then turned to go back to Castle-knock. On my way back I came along D'Olier Street and along Essex Quay, and came on into Wood Quay. At Wood Quay I was going at 6 to 8 English miles an hour. I saw a man starting to come from the corner of Winetavern Street at the Irish House. He came across from the Irish House towards the river. I saw him when I was about 40 yards away from him. I blew my horn when I saw him moving across, and I approached to about 8 yards from him, and he stopped just before he got to the centre of the road. I took that as an invitation to me to go on, and began to move along when he rushed across the front of the car. I gave a shout immediately I saw him move along. I could not say what I shouted. I applied all brakes at the same time. I swerved to the left, but I was too near the man to avoid killing him with the car. The car struck the man with the right-hand front mudguard. I pulled up the car as quick as I could and got out and assisted two men to put him in the car and drove off to hospital. These two men and others got into the car. When the man started from the corner at the Irish House, he continued to advance across in a slanting direction. I just let the car run on its own momentum. I took off the clutch. This disengaged all the gearing of the car from the road-wheels. It might be going at 4 miles an hour when it approached the man. When I saw him stop, I let it run on. There were two large acetylene head-lights in front and two oil-lamps on the dash in front of the driver's seat. At the time of the accident the car was lighted up as it was when seen by Inspector Mockler at Chancery Lane station. As we went to the hospital I met Constable Moran about half way. I stopped and took him up on the car. We then went to the hospital. It was later when I met Inspector Mockler, about 12 or 12.30 o'clock. What I stated to Constable Moran as he said to-day was all quite true." Cross-examined—"I was employed by the defendant to work for seven days for him, from the 24th August. I saw him last in October—not since. A gentleman was with him when we went into Jammet's. I never saw that gentleman since, nor before. I asked who he was, and I was told he was a jockey. I asked it at the racecourse. He rode at the races; I don't think he won. On my oath I don't

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K. B. Div. know his name. I don't know if he was a gentleman rider or a
1908. jockey. I don't know the two gentlemen whom I took to
O'REILLY Ratoath. They had a Rover car. I intended to inquire their
v. names to-day and I had not time. I have seen them since. I
McCALL saw one of them in the end of November at the Kildare Street
Club. He might be thirty years old. He was getting off a car
at the Club. I heard the name of the place he lives at. I don't
remember it. My wife is not here. I expect she is in Ringsend
at Brighton Terrace. The weight of the car was 30 to 35 cwt. I
could stop it in its own length. There are three brakes on it. At
8 miles an hour I could stop it in a length and half; at 6 miles
an hour in a length and a quarter. I could not stop it in less.
The clutch came off without the brakes being applied. The brakes
were not on at the time. The application of the brakes does not
stop the car instantly; you can take off the clutch and not put
on the brakes. There is a pedal for the clutch and a pedal for
the brake, and a brake at the side and a lever for the hind brake.
The lights would give at least 5000-candle power. This would
show an object in front at 50 yards' distance. When I saw him
crossing, he was about 40 yards from me. He might be more or
less. He was off the footpath at the time; about 5 or 6 feet off
it. The roadway there is very wide. I was coming on the left-
hand track itself—I passed along the place last Monday. The
left tram-track is practically the centre of the quay. I could have
stopped the car in its own length at 4 miles an hour. I saw the
car after the accident. The description given by the Inspector is
accurate. The mud-guard is bent over the wheel. It was bent as
the Inspector described it. The edge was bent at a previous
accident." To a juror—"I saw the bend before I took charge of
the car. It was not buckled before. The mud-guard was bent
down that night. I saw the defendant on the Monday after the
Saturday." Re-examined—"That Saturday was the only day I
ever drove this motor-car. I never drove it again, and I went
out of the defendant's service. Nothing occurred to car that
evening except the bending of the mud-guard. On account of the
accident the car was not used for the rest of the week."

Alfred Parsons examined—"I have been the medical atten-
dant of the defendant since September, 1905. I consider it

desirable for him to winter abroad. He has been doing so for the last four years." Cross-examined—"I believe he is gone to Egypt. I think he could return for a day and go back." To a juror—"I saw him on the 6th of this January, and I believe he left Ireland on the following day. I don't know anything about him. I can't swear that he is not in Dublin." To Mr. Lynch—"He could come here for a day or two from Egypt without injury to his health."

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Francis Curran examined—"I was on the footway opposite to No. 9 Wood Quay on the night of the 24th August last. The accident occurred opposite No. 5. There was no traffic except this motor-car. I saw it come from the direction of Essex Quay; only one man was in it. It was coming in the direction of Kingsbridge. The man was crossing the road, and the motorman sounded his horn four or five times. The man stopped and the car pulled up slowly. The motor-car went on and the man went across the road, and the motor-car swerved at him and then turned off to the left to avoid the man, and it caught him by the right-hand mud-guard on the front. The man fell on the ground. I ran over; the motor-car stopped. Two more men ran over." [A juror here asked that any other witnesses who are to be examined should leave the Court. This appeared to be at once attended to.] "I opened his coat and vest. The motorman said to me: 'Put him in the car.' Two others assisted, and the car went on. I heard the horn sounded. He commenced sounding it at No. 13 and he called to the man. O'Reilly stopped on the roadway on the tram-tracks, next the houses side, between the two tram-tracks." To a juror—"The car was going 8 or 9 miles an hour when he was coming along the quay." Cross-examined—"The motor-car was about 10 yards from the body when he was picked up. When I saw the motor-car strike him, I turned my head away. As far as I know he never moved from the time he was struck. The man started from the houses and was about midway across. I did not see him step off the path. When the motorman sounded his horn, I looked back and saw the man crossing the road." To a juror—"I know the Irish House. I could not say where he came from. I only saw him on the road." To counsel—"He was coming from the direction of the Irish House. He was about six yards

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from it when I saw him walking towards the horse trough. Of course there was plenty of room there for the car to pass. There was plenty of room for the motorman to go past on the side of the Irish House. The man proceeded towards the horse trough after the first sound. The motorman sounded again. He got two or three steps further when the second horn sounded. When the motorman sounded first, he was at a distance from him of from No. 5 to 15. There was no traffic. There was room for three motor-cars between where the man was and the footpath at the Irish House. The motorman slackened up the speed of the car. He came on without attempting to alter his course to get out of the man's way. After he struck the man the motorman went about ten yards before he pulled up." [It was here stated, and apparently not disputed, that the length of the motor-car was 15½ feet.] "I am a cooper. I know Whittaker by appearance. I have been speaking to him since the accident once, not about this case; about other cars. I was not speaking to him about this case yesterday, nor since yesterday."

Martin Owens examined—"I was on the houses side of Wood Quay on this night, at No. 8. It was opposite No. 5 that O'Reilly was knocked down. I was standing there about 10.15 or 10.30 o'clock. I saw a motor-car coming along Wood Quay. I saw a man starting from the footpath on the houses side. Then I heard a motor-horn three or four times. The man looked towards the direction of the motor-car. Then he darted in front of the motor-car, and the right-hand side mudguard struck him and knocked him down. The motor-driver pulled up at once and got down and gave two men a hand at lifting the man into the car. The motor-car pulled up a few yards from where the man was lying." To a juror—"I was standing on the footpath. I guessed it was the mud-guard that struck him." Cross-examined—"The man was just at the first tram-tracks when he was struck. He started to run. He was going to get across before the car came up. There was any amount of room for the car to pass between the footpath and the Irish House, but the man ran across. The motor-man slacked up before he came to him. When the man was crossing, the motor-man sounded the horn and slacked up. The man stopped on the road and looked to where the horn sounded

when it first sounded. He was 30 or 40 yards off then. The motor-man could have easily pulled up or gone to the left of him." To a juror—"The motor-car had not to be backed to the dead man. I am quite certain that when the motor-car stopped it remained there. I saw Whittaker at the Chancery Lane Station when he was arrested and afterwards, and I saw the defendant. I did not compare my evidence with Whittaker's, nor with the other witnesses. I am not acquainted with the driver. I did not know him before, and I did not go to the hospital."

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James M'Swiney examined—"I belong to the fire brigade. On the night of the 24th August I was in charge of the fire-escape in Wood Quay. I was standing at the fire escape in the street. It was about 20 past 10 o'clock when I saw the motor-car as it passed him. It passed slowly at a moderate rate of speed." To a juror—"Slowly for a motor-car." To counsel—"I was facing the river outside the box when the car passed him. I turned and patrolled back to my post. After I turned back I heard the horn blow. It had gone about half way up the Quay. I heard a shout. I took it to be 'Hi up! Hi up!' After I heard the horn I looked up the quay and saw a crowd. A man came and asked me to get the ambulance. That's all I saw." To a juror—"I did not go down to the accident; I stood at my own box."

Mr. Moriarty said that closed the defendant's case.

Robert Whittaker was then recalled at the request of a juror, and in answer to him said—"I left Chancery Lane Station on Saturday morning about 1 o'clock. I did not get home until 1.30 o'clock. On the Monday I was in the Bridewell. The car was in Chancery Lane until Monday. A mechanic from Hutton's took it away to have the mud-guard repaired. A fortnight after I saw it in another gentleman's possession. The mud-guard was repaired. The brake and clutch were all right. I was engaged by Hutton's a fortnight after. The mud-guard was stretched. There were no other repairs that I know of. The machine was in good order at the time of the accident; the mud-guard was bent before the accident, and more by the accident. I did nothing for Mr. McCall during the rest of the time. The car was never driven for him after that day." To another juror—"There was no chance whatever

K. B. Div. of my pulling up the car before I struck him. I went to the
1908. right. I was too near him to go to the left. He rushed across.”
O'REILLY To another juror—“I had no idea of when Mr. McCall would
v. return, or of when he was home. He did not know that I had
McCALL. taken the car to Ringsend and back.”

This closed the evidence.

I stated to counsel how I intended to deal with the case, and the questions I proposed to leave to the jury in accordance with what was done in the case of *Butterly v. The Mayor of Drogheda* (1), and the law as laid down in that case; and as regards the question whether Robert Whittaker at the time of the occurrence was acting within the scope of his employment, I would act on the law as laid down in *Gracey v. The Belfast Tramway Co.* (2) and the cases therein approved of. Mr. Moriarty asked me to rule and direct that there was no evidence proper to be submitted to the jury that Whittaker was at the time of the accident acting in the course of his employment as the defendant's servant. I declined to so direct. I thought this depended largely on how far the jury accepted his evidence respecting his going to Ringsend. His wife had been referred to at the close of the evidence on the first day of the trial. It was then said she could be produced on the following day. After the evidence for defendant was closed it was said she was in Court. She was not called. Her corroboration of Whittaker's evidence as to his going to Ringsend would have been material. It did not appear that the two gentlemen he said he left at Ratoath could not have been found and produced. Their evidence would also have been material. In the result the evidence as to Whittaker's going to Ringsend was allowed to rest on his own testimony. I told the jury that if they believed his evidence he was not acting on the defendant's business, nor within the scope of his employment, from the time when instead of stopping at the defendant's place at Castleknock, after leaving the two gentlemen at Ratoath, he went on his own account to Ringsend, without his master's permission and against his instructions. I thought it was for the jury to determine whether they accepted Whittaker's account of his journey to

(1) [1907] 2 I. R. 134.

(2) [1901] 2 I. R. 322.

Ringsend; and if they did not, I thought there was evidence that when the accident occurred he was acting in his master's business and within the scope of his employment.

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Mr. Jefferson, K.C., for the plaintiff, asked me to leave the first question to the jury. I did so at his request, but there was no dispute as to Whittaker being the defendant's servant at the time. Mr. Jefferson then referred to the defendant's defences which had been referred to before, and I said that now that the evidence on behalf of the defendant had been given, I would try the whole case, and leave the second question to the jury. If any amendment of the defence be necessary to raise this question, I think it should be allowed. I declined to allow an amendment at the close of the plaintiff's case, because I thought the jury should have any evidence, including Whittaker's, which the defendant could produce before them.

One of the jury appeared to have formed an opinion in the course of the trial very favourable to the plaintiff. He evidenced this by questions he asked and some interruptions, both during the evidence and while Mr. Moriarty (who was very patient with him) was addressing the jury at the close of the trial.

None of the other jurors indicated that they had formed any opinion before the jury returned their verdict, and all the jurors listened attentively to my charge, to which there was no objection, save what is implied in the requisitions I have referred to. Mr. Moriarty addressed the jury for the defendant, and Mr. Jefferson replied for the plaintiff, and commented on the non-production of Whittaker's wife, at which Mr. Moriarty observed that she was in Court. After my charge the jury retired, and in half an hour returned with the answers to the questions as given in the commencement of this report, whereupon I gave judgment accordingly.

WILLIAM D. ANDREWS.

14th February, 1908.

The defendant moved to set aside the verdict and judgment, and to enter judgment for the defendant or in the alternative for a new trial.

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Moriarty, K.C., and *James O'Connor*, for the defendant contended that there was no evidence of negligence on the part of Robert Whittaker, but that the accident was solely caused by the negligence of Michael O'Reilly; that at the time of the accident Whittaker was not acting as servant for the defendant within the scope and course of his employment, but was engaged on his own and not on the defendant's business; and that if any amendment of the statement of defence was necessary, such should have been made.

P. Lynch, K.C., and *Joseph O'Connor* (with them *Jefferson, K.C.*), for the plaintiff, contended that there was evidence of negligence on the part of Whittaker, and that at the time of the accident he was acting in the scope of his employment, which could not have been withheld from the jury, and upon which their verdict was founded.

As Whittaker was defendant's servant and in charge of the car, the defendant's property, the onus of proof rested on the defendant to satisfy the jury that he was not acting within the scope of his employment. The presumption of law to this effect was not rebutted. Whittaker himself was the only witness examined on this point, and the jury were entitled to disregard his evidence. The suggested amendment of the defence would have been of no service to defendant, as the jury disposed of any issue which could have arisen thereon in favour of the plaintiff. [The following cases were referred to: *Toronto Railway Co. v. King* (1); *Whatman v. Pearson* (2); *Stephens v. Woodward* (3); *Beard v. London General Omnibus Co.* (4); *Slattery v. Dublin, Wicklow, & Wexford Railway Co.* (5).]

Feb. 19.

LORD O'BRIEN, L.C.J. :—

This case has been very fully argued by counsel on both sides. Nothing that could with propriety be said upon the subject has been left unsaid. The view I take of the case as a whole is that

(1) [1908] A. C. 260.

(2) L. K. 3 C. P. 422.

(3) 6 Q. B. D. 318.

(4) [1900] 2 Q. B. 530.

(5) 3 A. C. 1155.

the trial was unsatisfactory. The word "unsatisfactory" as a ground for granting a new trial did not commend itself to the late Mr. Justice William O'Brien, but the word has been adopted by Lord Halsbury more than once, and by Lord Esher, and it was used by Lord Blackburn in *Slattery's Case* (1). Why do I say that the trial was unsatisfactory? In the first place, I think that one of the jurors at the trial showed that he was acting impulsively and with animus. The learned Judge reports that one of the jurors appeared to have formed an opinion in the course of the trial very favourable to the plaintiff. He evidenced this by the questions he asked, and some interruptions both during the evidence and while Mr. Moriarty (who was very patient with him) was addressing the jury at the close of the trial. I think it is quite plain that the juror referred to exhibited animus, and was not in that unprejudiced state of mind which is essential to a fair trial. It is a curious thing that a question was asked of the defendant's doctor by one of the jurors—I do not know whether it was the same juror—whether Mr. McCall was not in Dublin during the trial, which would go to show that the jury would not believe anything at all that came from the defendant's side. I myself am very particular about jurors comporting themselves with propriety in the jury-box. It is not because it is a motor case that a juror is to make an unbecoming exhibition of himself in the jury-box. I think the expression of the learned Judge as to Mr. Moriarty being very patient with the juror shows that his conduct was very trying to counsel. So much for the conduct of the juror.

Some observations were made upon the fact that the wife of the motor-man was not produced. Mr. Moriarty certainly had her in Court on the second day of the trial; and I think it is quite plain that he would not have brought her to Court unless he intended to produce her, if the jury indicated in any way that they required her. He stated very emphatically that the jury intimated to him that they did not require her. How that is I cannot say, but he certainly made that statement. However, the fact of her being brought there shows a *bona fide* desire on his part to have her there should she be asked for.

(1) 3 A. C. 1155.

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When an application was made to the learned Judge to amend the pleadings, a reasonable offer was made by Mr. Moriarty to let the case be adjourned for a week, and to pay all the costs of the adjournment. I will first read the learned Judge's report of what occurred :—" Mr. Moriarty contended that the authorities referred to by Mr. Lynch did not apply, but asked leave to amend by adding a defence directly raising the question of whether Whittaker at the time of the occurrence was acting within the scope of his employment. I declined to give leave at that stage of the case to add this defence, and said that irrespective of the question of pleading I thought there was evidence to go to the jury on both grounds. I also thought that as the case stood on the pleadings and evidence the jury should have the evidence of Robert Whittaker, who was in Court. Mr. Moriarty then asked me to make a note that he offered to pay the costs of the day and have the trial adjourned for a week, and pay any costs incurred by the adjournment, if I gave leave to add at that stage the further defence referred to." I think that was very reasonable on the part of Mr. Moriarty; and if the case had been adjourned for a week, all questions as to non-production of those other witnesses would have been at an end. I confess that this is also a strong reason for saying that the case has been unsatisfactorily tried.

Then there is the main question—Was it open to the jury to find that Whittaker was at the time of the accident acting within the scope of his duty? There was no one in the motor-car but himself. He says that he had directions to leave the two gentlemen at Ratoath, and then to take the motor-car to his employer's residence, but that, instead of following these directions, he took the motor-car to Ringsend in order that he might visit his wife, and that he was returning from the visit to his wife at Ringsend when the accident happened. If that is true, he was at the time acting outside the scope of his duty; and, in my judgment, the weight of evidence—I emphasize the word "weight"—would go to show that it is true. Now I put it to counsel, who argued this case so very well on the part of the plaintiff, did Whittaker invent this story? If he did, he must be a marvel as a lawyer, because the only reason why he should invent it would be to raise

a point of law as to scope or course of duty, and I think that is a very far-fetched contention. The weight of evidence is that, instead of obeying his master's instructions to go home, he went to Ringsend to see his wife, and in so doing he was not acting in the scope of his duty.

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On the whole case we think there should be a new trial. The pleadings will be amended in the way suggested, and as to the costs we think it better that the costs of the former trial and of this argument should abide the result. I must say I see no objection to the manner in which my brother Andrews ultimately left the case to the jury—that is to say, I think the questions unobjectionable, and that it was not necessary to leave to the jury that long formula as to contributory negligence which so much excited the wrath of Chief Justice Monahan.

GIBSON, J. :—

As the case is to go to a new trial, I do not wish to discuss the merits. I agree in the contention put forward by the plaintiff that at the close of the plaintiff's case there was some evidence to go to the jury, first that the negligence of the defendant was responsible for the accident, and secondly that the chauffeur, Whittaker (who was the admitted servant of the defendant), was acting within the scope of his employment. It was pointed out by plaintiff's counsel that the defendant's defence did not traverse this scope of employment, apparently admitting that the man was acting within the course of duty; and I agree with my brother Andrews that the defence as filed did not raise the point. But inasmuch as the answers to the interrogatories showed plainly that acting outside the scope of authority was to be a working defence at the trial, it is certain the plaintiff was not taken by surprise. The learned Judge did not accede to the defendant's application to amend at that stage, although Mr. Moriarty was willing to accept very onerous terms as to payment of costs. If the amendment had then been allowed, and the trial had stood over, some weight might have been attached to the circumstance that the Ratoath gentlemen and the gentleman jockey were not called; but inasmuch as the learned

K. B. Div. Judge declined to allow the amendment, and the case would
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Gibson, J. Judge declined to allow the amendment, and the case would conclude next day, I think it would have been unusual for defendant's advisers to have instituted a roving inquiry for witnesses who might not be required at all. The defendant then went into evidence, and at the close of the case the learned Judge said that the amendment ought to be allowed. During the progress of the defendant's evidence, one of the jurors appears to have interfered in a very unusual way, so much so that his conduct is elaborately described by the learned Judge. This case is fought by an Insurance Company, and yet one of the jurors suggested that this Mr. McCall was possibly in Dublin keeping out of the way at the time of the trial. I think that was a most improper suggestion of the juror, and I regret it, because it suggests that he was hardly in a fit state of mind to try the issue raised. When counsel was addressing the jury, the juror intervened again, and Mr. Moriarty is described as treating him with great patience. I attach considerable importance to this exhibition of apparent prejudice.

At the close of the defendant's case was there evidence of negligence? and was there evidence that Whittaker was acting within the scope of his authority? Having regard to what was deposed to on both sides, I myself would hesitate very much before I would send the case to a new trial if the decision rested on mere negligence alone. Each case, however, must depend upon its own facts, and looking at all the facts of this case I am inclined to adopt the word "unsatisfactory" (an expression adopted in many English cases and by the House of Lords) as representing my view of the character of the trial. Apart from the conduct of the juror the absence of any specific finding as to the contributory negligence is important.

With regard to the second question, as to whether Whittaker was acting within the scope of his authority, I have to refer to the interrogatories. I entirely agree that the answers cannot be used for the purpose of upsetting the verdict of the jury; but they may to a great extent affect the discretion of the Court in granting a new trial when we think there was no surprise. I think the defendant's counsel acting in the ordinary way would probably assume on the answers to the interrogatories, and having regard to the financial

and independent position of Mr. McCall, that the plaintiff's counsel would not suggest that Mr. McCall was lying or guilty of perjury. These answers to the interrogatories were before plaintiff's counsel. If my brother Andrews saw them, amendment was obviously proper. The chauffeur says that he got orders to bring the two gentlemen to Ratoath; the subsequent part of his duty, namely, to leave the vehicle at home, was a matter of implication. A great deal of weight is attached to the fact that this chauffeur is not corroborated. I do not attach much importance to the Ratoath gentlemen as witnesses. They were certainly left at Ratoath, and, assuming they were left at Ratoath, what brought the chauffeur back to Dublin? He says that he went to see his wife. If he went the whole way to see his wife, and for no other purpose, he would have been plainly acting outside the scope of his duty. But it is suggested (and I think this is the best suggestion that could be put forward) that the chauffeur, having got no specific directions from his employer, went back to Jammet's to take him up; and, finding that his master did not want him, he went to see his wife at Ringsend, or somewhere else. The difficulty is to fit in that theory (which is mere speculation) with the other facts of the case. Of course, if that view is correct, and if he went to Jammet's for his master, and from Jammet's went on to his wife at Ringsend, and after this detour was returning home at the time of the accident, he might then be considered as acting within the scope of his master's business; whether he did or did not actually see his wife, or whether he visited Ringsend at all, would be immaterial: he would have been on his way home from the restaurant after making the detour.

Why the wife was not examined I do not know. A number of suggestions may be given as to why she was not called. One reason given was that she was not a wife at all; but I am bound to say that if she were in Court, and counsel were to make remarks of that sort, I myself would have had her examined. Why did Mr. Moriarty bring this woman into Court at all except as an indication that she was ready to be examined, if anyone wanted her? Seeing the answers to the interrogatories, I think it is impossible to say that the man who swore that affidavit did not negative the visit to Jammet's.

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I regret that only one question was left to the jury as to negligence, and not contributory negligence. It was a case of essentially contributory negligence. O'Reilly was bound to see this formidable vehicle coming along; but he tried to cross the roadway, and the accident followed. Though contributory negligence was pleaded, the learned Judge did not put contributory negligence to the jury; and I think the jury may have been, to a certain extent, misled by that. I think it would have been better if the Judge had put a separate issue of contributory negligence; but, no doubt, he was not asked to do so. I refer to *Slattery's Case* (1), in which the House of Lords dealt very strongly with this point. At that time it was not possible to appeal to the Exchequer Chamber, except upon the ground that there was no evidence at all. On the question of the verdict being against the weight of evidence there was no appeal, and consequently the Exchequer Chamber and the House of Lords were bound by the decision of the Common Pleas, that the verdict was not against the weight of evidence. However, the members of the House of Lords were all strongly of opinion that the Court of Common Pleas ought to have sent the case to a new trial; and they deplored the result as a failure of justice. In that case the great point was the distinction between the issue of negligence and contributory negligence. Contributory negligence should be left as a separate issue. See judgment of Lord Penzance in *Slattery's Case* (1).

On the whole, while I regret that the case should be sent to a second trial, I agree with my brethren in thinking that it would not be right that the verdict should stand. I in no way indicate what I think the result of the new trial should be. Much difficulty has arisen from the amendment not having been made at an earlier period.

BOYD, J.:—

I agree that this verdict is most unsatisfactory, and ought to be set aside. The whole trial proceeded on an erroneous basis. Evidently, one juror was interrupting from the beginning

of the case to the end, and the moment a witness for the defendant was put into the box he demanded that all the other witnesses should be put out of the Court, showing manifest bias against the defendant. Again, when Whittaker, the chauffeur, was called at the end of the case he was subjected to cross-examination by a juror—I presume the same energetic gentleman. I think this juror seems to have had both the vehemence and volubility attributed to one of the witnesses by the learned Judge. Whittaker made an emphatic statement against his own interest when he said that Mr. McCall did not know that he had taken the car to Ringsend and back. He never drove the car previously, and he never drove it afterwards. He left the service of Mr. McCall, and had been with two other people since as a driver of motor-cars. Therefore there is no reason why he should take upon himself the entire blame of this transaction except that he is telling the truth. I must say that it would have been better to have produced the wife; but I think there was abundant evidence to corroborate Whittaker, having regard to the affidavit we have heard read.

Whittaker told the same story at the trial that he did in the beginning, viz. that he was not acting in accordance with his duty when the accident occurred. Dr. Parsons swore that for three years previously he had been in attendance on Mr. McCall, and that he had been obliged to go abroad for the benefit of his health. On the 6th of January Mr. McCall made his affidavit, and on the 7th he left for Egypt, and he had not been back afterwards. The doctor was cross-examined as to whether the defendant could not come back for a day—that is not the sort of trip a medical adviser would allow a sick man to undertake. Notice of trial was not served until after Mr. McCall's departure; and I am not satisfied that Mr. McCall's departure was not perfectly well known when the notice of trial was served.

Whittaker told his story to the policeman, and he never concealed anything; and, as far as I can judge from the report of the evidence, he seems to have been a man who was honestly telling the truth, whether he had done right or wrong. Instead of that he is treated in the most cavalier manner by some of

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I think it was proved over and over again that the horn was blown. The man got off the pathway at the Irish House, and went across towards the horse-trough. He was seen by the motor-man forty or fifty yards off; and the horn was sounded then, and three times. There is another corroboration of what took place. It is proved that the motor-man shouted, "Hi up! Hi up!" Why should he shout, "Hi up! Hi up!" except that the man was doing something on the spur of the moment.

Under these circumstances, and considering the whole course of the trial, especially as regards Mr. McCall's absence, the nature of the pleadings, and the most proper effort that was made by Mr. Moriarty to adjourn the case, and his offer to pay the costs of the adjournment, so that the pleadings might be amended, I think the verdict was obtained under unsatisfactory conditions, and should be set aside.

J. L.

Appeal.
May 7.

The plaintiff and defendant both appealed from this decision, the plaintiff seeking to retain her verdict and the defendant seeking to have a verdict and judgment entered for him (1).

Jefferson, K.C., and Lynch, K.C. (with them *Joseph K. O'Connor*), for the plaintiff.

Moriarty, K.C., James O'Connor, K.C., and E. A. Swayne, for the defendant.

THE LORD CHANCELLOR :—

There is no doubt that we could not disturb the findings of the jury as to negligence on the part of the driver; and also there was a presumption, but only a presumption, that the latter was at the time of the accident the servant of the defendant, acting within

(1) In the Court of Appeal, before the LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

the scope of his employment; and, therefore, if there was nothing more in the case, there would have been a clean verdict for the plaintiff, which we could not disturb. Mr. Moriarty, however, at the close of the plaintiff's case, applied to the learned Judge for leave to amend by adding a defence, raising the question whether or not Whittaker, at the time of the occurrence, was acting within the scope of his employment; and, although leave to amend was refused at that stage of the case, the questions submitted to the jury included the specific one—Whether Whittaker at the time of the occurrence, when driving the motor-car, was acting as defendant's servant within the scope of his employment?—a question which was answered in the affirmative by the jury, though at that time there was evidence, conclusive and uncontradicted, that he was not.

What are the facts of the case? On this particular evening, Whittaker had been directed by his master, that after leaving at Ratoath the two gentlemen whose car had broken down he should go to Castleknock, and leave the car there. Whittaker did not do so; after leaving Ratoath he did not diverge to Castleknock, but instead he drove the car to Dublin, and across the whole city, proceeded to visit his wife at Ringsend, where she resided, and he was obviously on his way back from that to Castleknock, which he had left behind him, when he ceased to act on his master's directions, and when the accident occurred. He went along Wood Quay, that being the natural way for him to go out to Castleknock from Ringsend, proceeding along the quays and through the Phoenix Park. All these facts are proved—that he had been at Ratoath, that he had gone to see his wife at Ringsend, and that he then proceeded back towards Castleknock along Wood Quay, where the accident occurred; and, there being no evidence opposed to these facts, the jury have taken upon themselves to say that, in point of fact, he was doing his master's business, and was acting within the scope of his employment when driving along Wood Quay on that evening.

That finding implies that the jury disbelieved Whittaker's evidence, but then there was no evidence that Whittaker was on his master's business, or was acting within the scope of his employment. On the other hand, there was express evidence

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that he was not—evidence not contradicted or controverted in any way. Can such a verdict, without evidence to support it, and in particular having regard to the policeman's evidence of the statement made to him at the time by Whittaker that his address was Ringsend, be allowed to stand? Under these circumstances we are all of opinion that it cannot.

The only real question is whether, having regard to the cross-notice of appeal, we are now justified in entering judgment for the defendant, instead of sending the case for a new trial. It is not suggested that the evidence was capable of contradiction, and we think that it would be a mercy to both parties to put an end to this litigation. Accordingly we will affirm the order of the Divisional Court so far as it sets aside the verdict and judgment for the plaintiff, but we will enter judgment for the defendant in pursuance of his cross-notice of appeal.

FITZGIBBON, L.J. :—

My only doubt in this case has been whether we can hold the defendant entitled to have the verdict entered for him, or whether an order for a new trial is the limit of our jurisdiction; but I respectfully agree with the Lord Chancellor that we have jurisdiction, and that we ought, to enter judgment for the defendant. As we are going behind the findings of the jury, our order will declare that "It appears to the Court that Whittaker at the time of the occurrence was not acting within the scope of his employment," and judgment will be entered for the defendant accordingly.

At the close of the plaintiff's case, the evidence that the chauffeur was at the time of the accident acting within the scope of his employment was merely presumptive, the presumption arising from the facts—(1) that the car which did the damage was proved or admitted to be the defendant's car; and (2) that the person who was driving it was employed by the defendant as a chauffeur. The presumption arising from these facts ceased when, or if, sufficient and uncontradicted evidence was given to prove that what brought Whittaker to Wood Quay was not the defen-

dant's business. The case depends, in my opinion, on the question whether it is proved, with nothing to contradict it, that Whittaker had gone to see his wife at Ringsend, and was returning from the visit when the accident occurred. Could any reasonable jury find that the entire statement made by Whittaker was false, in which he described the whole course of his proceedings on that evening, when he seems to have acted with perfect sobriety, except in so far as he diverged from his duty to his employer, and went off to Ringsend on his own private business? If we consider the position geographically, and ask what brought Whittaker to Wood Quay between 11 and 12 o'clock on that night, it is impossible to account for his being where he was at that hour, except that he was on his way back from Ringsend. He could not have been at Wood Quay on his way back from Ratoath to Castleknock; his own uncontradicted evidence is that after leaving Ratoath he came back by Blanchardstown and Castleknock, but instead of stopping at Castleknock, he came on through Dublin to Ringsend. From the moment he passed Castleknock, he had diverged from his master's business, and was going on business of his own.

Positive, detailed, and persuasive evidence has been given on behalf of the defendant on the real point at issue; this evidence is uncontradicted, and it is not suggested that it could be contradicted on a second trial; and, under the circumstances, I agree that there is no evidence to sustain a finding that Whittaker was acting within the scope of his employment, and, therefore, that judgment should be entered for the defendant.

HOLMES, L.J., concurred.

R. ST. J. C.

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L.J.

The plaintiff appealed *in forma pauperis* to the House of Lords (1).

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1909.
Dec. 8.

(1) Before the LORD CHANCELLOR, LORD ATKINSON, LORD GORELL, and LORD SHAW OF DUNFERMLINE.

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Jefferson, K.C., and *Joseph K. O'Connor*, for the appellant.

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Acland, K.C. (of the English Bar), and *E. A. Swayne*, for the respondent.

THE LORD CHANCELLOR (1):—

My Lords, in this case I am unable to concur in the judgment of the Court of Appeal. It seems to me, with the greatest respect to them, that they came to a conclusion and entered judgment which was inconsistent with the finding of the jury, and that, quite apart from the question of jurisdiction, it is not the function of a Court of Law to find facts; it is their duty to decide the law of a case, and also to correct anything that has been done amiss by reason of the perversity of the jury, or if they think that there has been a miscarriage of justice.

Taking the view which I do, I shall say very little in regard to the evidence in this case, because your Lordships, I think, are of opinion that there must be a new trial. There was evidence of negligence, in my opinion, to go to the jury, and there was further evidence of negligence to be found in the evidence which the defendant gave. That is a question for the jury and not for Judges. There was evidence *prima facie* that the driver was acting within the scope of his authority, driving, as he was, the car of the defendant in the public street, going towards the defendant's house, while he was in the service of the defendant.

It was sought to rebut this by the testimony of Whittaker, who said that, while he was driving this car on the present occasion, he was engaged for his own amusement, and not on the service of his master. The question is whether the jury were entitled to disbelieve Whittaker upon this subject. I do not enter upon the question; but it was undoubtedly treated by the learned Judge as a serious question, and it is certain that the jury came to the conclusion that they did not accept Whittaker's statement.

It is, however, the opinion of the Judges in the King's Bench Division in Ireland, and I think it is also the opinion of your

(1) The judgments in the House of Lords are printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

Lordships, that, in view of all the circumstances, which, as I say, I designedly do not enter upon, it is right that this question, and the question of negligence, should all be reconsidered in a fresh trial before another jury. There are certainly circumstances connected with the trial, with the pleadings, and with the way in which the evidence was presented, which make it desirable that this matter should be again investigated.

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In regard to the costs: taking this view, I think it would be right that the costs of this appeal should be the appellant's, and also that the costs in the Court of Appeal, which entered judgment for the defendant, should be the appellant's; and that, in regard to the costs of the first trial, and the costs of the proceedings in the King's Bench, they, together with the remaining costs which may hereafter be entailed, ought to be costs in the cause; and I shall move your Lordships accordingly.

LORD ATKINSON:—

My Lords, I concur. I really think that a great deal of the difficulty that has arisen in this case is because it was (if I may use the expression) only half tried. The different issues were not pursued as they ought to have been, and matters cleared up which are left in doubt; and therefore, the only satisfactory way of disposing of the matters in controversy between the parties is, as my noble and learned friend on the Woolsack has indicated, by giving a new trial.

LORD GORELL:—

My Lords, I concur in the observations which have been made by the noble and learned Lord on the Woolsack, and by my noble and learned friend, Lord Atkinson.

LORD SHAW OF DUNFERMLINE:—

My Lords, I concur, and I have only one observation to add, namely, that I think a good deal of the mischance which has occurred in this case would have been avoided if the learned Judge at the trial had seen fit to adopt the offer that was very properly made by the learned counsel for the respondent, Mr. Moriarty, to

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pay the expenses of the day's proceedings in order to allow the pleadings to be amended, and, the fresh issue openly and in the eyes of both parties being then placed upon the record, that fresh issue to be tried at an adjourned diet. Had that proposal been acquiesced in, I think all this mischance would have been avoided. My Lords, in regard to that, if you will look at the judgment of the Court of King's Bench, it will be found that the fresh matter is there ordered to be part of the new trial which was then suggested. I gather that this course (the consideration of the fresh matter) will be pursued at the new trial.

I agree, my Lords, subject to that observation, with the course which is proposed.

LORD GORELL :—

There is one point about costs which I should like to bring to your Lordships' attention. The effect of the judgment which your Lordships' House is now about to pronounce would be that the order of the Divisional Court would stand, ordering a new trial. It was against that order that the plaintiff appealed to the Court of Appeal in Ireland, and on that appeal there was a cross-appeal; and therefore it may be a question, which, perhaps, might be considered for a moment, as to whether the order of the House should include in what your Lordship on the Woolsack said, that the costs of the appeal to the Court of Appeal should be the appellant's.

THE LORD CHANCELLOR :—

I think there is great force in what my noble and learned friend has said; and, if that be the view of your Lordships, the proper order would be, that the costs in the Court of Appeal in Ireland, like the costs of the first trial in the King's Bench Division, would be costs in the cause.

Questions put :—

That the order appealed from be reversed.

The Contents have it.

That this case go for a new trial.

The Contents have it.

That the respondent do pay to the appellant the costs of the appeal to this House, and that the costs of the first trial, the proceedings before the King's Bench Division, and the proceedings before the Court of Appeal in Ireland, be costs in the cause.

The Contents have it.

Acland, K.C. :—

My Lord, I do not know whether I am in order in mentioning the fact that the appellant in this case was a pauper, and therefore there would be no costs.

Jefferson, K.C. :—

That is so.

THE LORD CHANCELLOR :—

You are quite right in mentioning it, Mr. Acland. It will be such costs as are given in pauper cases. The order will be so understood. It will be entered in the usual form.

Solicitor for the plaintiff: *J. G. Lidwell*; Agent: *H. Z. Deane*.

Solicitor for the defendant: *E. White*; Agents: *Bellord, Coveney, Synnott, and Figgis*.

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Dec. 9.

SHANNON v. OGLESBY AND O'CALLAGHAN (1).

(1909. No. 13,420.)

Practice—Remitting action to County Court—One defendant resident in Ireland and one in England—Interlocutory judgment marked against defendant resident in Ireland—Common Law Procedure (Ireland) Act, 1870 (33 & 34 Vict. c. 109), s. 6.

An action of trespass was brought against two defendants, A and B. A resided in Dublin and B in Liverpool. A was first served with the writ of summons, and, no appearance having been entered by him, interlocutory judgment was marked against him. B having been afterwards served with the writ, applied to have the action remitted for trial before the Recorder of Dublin:—

Held, that there was no jurisdiction to remit.

MOTION TO REMIT.

The writ of summons claimed damages against two defendants, John Oglesby, and Mary Josephine O'Callaghan, for improperly distraining and for trespass. The defendant Oglesby resided within the civil bill jurisdiction of the Recorder of Dublin; the defendant, Mary Josephine O'Callaghan, was usually resident in Liverpool. The defendant Oglesby was served first with the writ, and not having entered an appearance within the time limited, interlocutory judgment was marked against him. The defendant Mary J. O'Callaghan was subsequently served while temporarily in Dublin on business. She now applied under section 6 of the Common Law Procedure (Ireland) Act, 1870, to have the action remitted for trial before the Recorder of Dublin in default of the plaintiff giving security for costs.

R. Kinahan, for the defendant Mary J. O'Callaghan.

Louis Kelly, for the plaintiff, raised a preliminary objection:—
There is no jurisdiction to remit. No doubt where there are

two defendants in different civil bill jurisdictions the action may be remitted to the jurisdiction in which one of them resides, on the joint application of both; or on the application of one with the acquiescence of the other: *M'Gloin v. Healy and Robinson* (1); *Baxter v. Great Northern Railway Co. of Ireland* (2); *Garland v. Blackstock* (3). But here the defendant Oglesby is not in a position to acquiesce, since judgment has been marked against him. He is out of the case, and so far as the present application is concerned the position is the same as if Miss Mary J. O'Callaghan was the sole defendant.

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OGLESBY.

Kinahan, for the defendant.

A great hardship might be inflicted if it should be held that there is no jurisdiction to remit in a case such as this. A plaintiff by deliberately delaying to serve a defendant out of the jurisdiction until he had obtained interlocutory judgment against the defendant within the jurisdiction, could prevent an action, however frivolous, being remitted.

JOHNSON, J. :—

In this case there is no jurisdiction to remit. The words of the section are clear. The order authorized to be made is, "that the cause be remitted for trial in the Civil Bill Court of the division of the county in which the defendant usually resides." Here the defendant Oglesby is out of the case, which now stands simply as between the plaintiff and this lady, Miss O'Callaghan. She applies to have the action remitted to the Recorder of Dublin, but she has nothing to say to the Recorder of Dublin, since she is usually resident in Liverpool. The motion must be refused.

BOYD, J., concurred.

Solicitor for the plaintiff: *Edward Felton*.

Solicitor for the defendant Mary J. O'Callaghan: *Michael A. Corrigan*.

J. G. T.

(1) 37 Ir. L. T. R. 136. (2) 26 Ir. L. T. R. 137. (3) 20 L. R. Ir. 194.

Appeal.

1909.

Dec. 10.

IN THE MATTER OF THE TOWN TENANTS (IRELAND) ACT, 1906. HULDAH EDMONDSON, JOSEPH EDMONDSON, AND GEORGE BEALE EDMONDSON, APPLICANTS; THE EARL OF PEMBROKE AND MONTGOMERY, RESPONDENT (1).

Town Tenants (Ireland) Act, 1906 (6 Edw. 7, c. 54), ss. 3 (3), 17—Sanction of proposed improvements—Holding—Permanent buildings contemplated by lease—Extension of premises to meet increase and development of business.

By lease, dated the 2nd July, 1897, a plot of ground in the village of D., containing 4A. 1R. 30P., was demised to the applicants, who were laundrymen, for a term of 150 years, from the 25th March, 1896. The lease was made in consideration partly of the lessees having erected new laundry buildings, to the satisfaction of the lessor, on the demised premises at an expense of £6000. The lease contained a clause prohibiting the erection on the demised premises, without the consent of the lessor, of "any wooden sheds, wood-roofed buildings, or any other buildings or erections whatsoever, except summer-houses and greenhouses, and except further buildings, or alterations to existing buildings, which may be required for the use of the laundry business now carried on upon the demised premises." The laundry buildings occupied about two acres, leaving two acres unbuilt upon at the date of the lease. On these the applicants proposed to erect an extension of the laundry at a cost of £1500, which extension was necessary to provide accommodation for the increasing business of the laundry. In the opinion of the Court of Appeal this extension was suitable to the character of the holding, and would not depreciate the letting value of the adjoining property of the landlord:—

Held, that the demised premises constituted a "holding" within the 17th section of the Town Tenants (Ireland) Act, 1906, and, reversing the decision of the Recorder of Dublin, that the proposed additional buildings should be allowed, notwithstanding that the landlord objected.

APPEAL by the applicants from the order, dated 9th November, 1909, of the Recorder of Dublin, dismissing their application to disallow objections by the respondent to contemplated additional

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

buildings proposed to be erected by applicants at their laundry, called the Manor Mill Laundry, Dundrum (1).

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The applicants held these premises under a lease from the respondent of the 2nd July, 1897, in which the premises were described as containing 4A. 1R. 30P., and as situate in the townland of Dundrum. Part of the consideration for the lease was recited to be the erection by the lessees of new laundry buildings. These had been erected at a cost of £6000. The term was 150 years, from 25th March, 1896, the rent £170 yearly. In a prior lease, dated the 15th June, 1863, the premises had been described as bounded by the street of Dundrum.

EDMONDSONS,
Applicants;
EARL OF
PEMBROKE,
Respondent.

The Court of Appeal were clearly of opinion on the evidence

(1) The material sections of the Town Tenants (Ireland) Act, 1906, are:—

Section 1 (1): Subject to the provisions of this Act, a tenant of a holding to which this Act applies may, on quitting his holding, claim, in the prescribed manner, compensation, to be paid by the landlord, in respect of all improvements on his holding made by him or his predecessors in title, which, at the date of such claim, add to the letting value of the holding, and are suitable to the character of the holding, and have not diminished the letting value of any other property of the landlord.

Section 3 (1): Where a tenant of a holding proposes, after the passing of this Act, to make improvements in his holding, he shall send to his landlord notice, in the prescribed manner, of his intention to make such improvements, together with a specification and plans of the proposed improvements; . . . if the landlord . . . sends . . . notice objecting to all or any of the improvements, the tenant may apply to the Court, and the Court may, if satisfied that the improvement will add to the letting value of the holding, and is reasonable and suitable to the character thereof, and will not diminish the letting value of any other property of the same landlord, sanction all or any of the proposed improvements, making such modifications in the specification or the plan as the Court thinks fit.

Section 3 (3): A tenant shall not be entitled to claim compensation in respect of any improvements made after the passing of this Act, unless he has given notice thereof under this section, and (in case the landlord has given notice of objection thereto) the improvements have been sanctioned by the Court.

Section 17: The holdings to which the provisions of this Act relating to compensation for improvements apply are houses, shops, and other buildings, situate in urban districts, towns, or villages, and occupied either for residential or business purposes, or partly for residential and partly for business purposes.

Appeal. that the premises were situate in the village of Dundrum. Other material provisions in the lease of the 2nd July, 1897, referred to in the course of the arguments, are stated fully in the judgment of the Lord Chancellor, *infra*, p. 80.

EDMONDSONS,
Applicants;
EARL OF
PEMBROKE,
Respondent.

The adjoining property of Lord Pembroke consisted of a residential holding demised to Mr. Lowe, some cottages let at small rents, a vacant piece of ground which might be let for building, but had not been hitherto utilized for that purpose, and premises occupied by a cab proprietor.

The proposed buildings were to be erected at a cost of £1500. They would come to within four feet of the boundary. They were to be constructed of iron and concrete, and were a lateral extension of the existing two-storied building. The entrance to the laundry was in the Main Street of Dundrum. The village of Dundrum contained 529 persons at the last census; 160 to 180 persons were employed at the laundry.

Mr. Joseph Edmondson, one of the proprietors, proved that, owing to the natural development of the business, they were cramped for space, and that the enlargement was required for additional washing and ironing accommodation.

Mr. Lowe, a neighbouring proprietor, holding 56 acres from the respondent, under lease for 150 years, proved that the proposed addition would not damage his premises. Similar evidence was given by another leaseholder in the immediate neighbourhood, Mr. J. O. Richardson, who had an unexpired term of 130 years.

Mr. Crawford Smith, engineer of the Pembroke estate, deposed that there were expensively erected houses on one side, which, in his opinion, would be detrimentally affected by the proposed addition, which would diminish their value. The present rental of the cottages was small, because they were benevolently erected for the benefit of the tenantry. There was a large cab establishment, held under Lord Pembroke, close to the laundry, also a vacant plot of building ground. The ventilation of the cabman's premises would be injured by the new building, and, if it was permitted, no one would build on the vacant ground. Witness thought the proposed building would seriously diminish the letting value of all property in the neighbourhood.

According to the Recorder's notes, no other evidence was pro-

duced for the respondent. A newspaper report of the Recorder's judgment was produced, from which it would appear that the learned Judge held—(1) that the laundry was not in the village of Dundrum, and (2) that the buildings would damage adjoining property of the landlord; and he accordingly dismissed applicants' application, and upheld Lord Pembroke's objections.

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EDMONDSONS,
Applicants;
EARL OF
PEMBROKE,
Respondent.

Brunskill (with him *Gordon, K.C.*), for the appellants:—

This is plainly a holding within the meaning of section 17 of the Act. Half of the ground was at the date of the demise actually occupied by buildings intended to be used for business purposes, viz., a laundry on a large scale. Increase and development of the business were natural, and were anticipated by the parties, as is apparent on the face of the lease. While there is a general restriction on building, there is an exception made of such further buildings or alterations as may be required for the use of the laundry. The proposed addition comes within the very words of this exception. The two acres unoccupied by buildings at the time when the lease was granted were a necessary adjunct to the laundry premises: *Barnes v. Southsea Railway Co.* (1)—a case decided under section 92 of the Lands Clauses Act, 1845. There is no reliable evidence here that injury would be done to the adjoining lands: *Guardians of Croom Union v. Trench* (2). Two owners of adjacent property have come forward to prove that they do not anticipate injury or inconvenience. As to the premises being situate in the village of Dundrum, the evidence to that effect is incontestable, and it is in accordance with the description in the earlier lease of 1863.

The addition of the proposed building is necessary for the business of the lessees—is suitable to the holding, and must increase its value.

Conner, K.C., for the Earl of Pembroke and Montgomery:—

To come within the definition of "holding" in section 17 of the Act, the premises in the tenant's occupation must be occupied for residential or business purposes, or for both combined. Here

(1) 27 Ch. D. 536.

(2) 27 Ir. L. T. R. 28.

Appeal. we have land demised, half of which is unbuilt upon as yet, and
 1909. therefore that half cannot be occupied either for the only business
 EDMONDSONS, that is being carried on, or authorized by the lease to be carried
Applicants; on, or for the purpose of residence: *King v. Wycombe Railway Co.*(1).
 EARL OF The evidence shows that the vacant plot of building ground
 PEMBROKE, belonging to the landlord, and the premises of the cab proprietor,
Respondent. will be injured if the proposed erection is allowed. The opinion
 of Mr. Crawford Smith is, that after these erections it would be
 impossible to get the building site taken. The case, therefore,
 is not brought within the Act, and the learned Recorder was
 right in allowing the landlord's objections.

THE LORD CHANCELLOR:—

We do not require to hear the appellants' counsel in reply.

I am of opinion that this is an extremely plain case, and is, I think, within the very terms of the Act. The granting of the present application confers no right on the Messrs. Edmondson. It only enables their successors to put forward a claim in the year 2046. This will not be determined upon now.

Mr. Conner says this is not a holding within the 17th section of the Act. Three subjects are mentioned in section 17—"houses, shops, and other buildings, situate in urban districts, towns, or villages, and occupied either for residential or business purposes, or partly for residential and partly for business purposes." What we have to consider here is whether these premises do not come within that section. By the lease of July, 1897, it is witnessed that, "in consideration of the lessees having erected new laundry buildings" (there was before that only some old machinery there), "and having carried out sundry alterations and repairs on the premises hereinafter demised, to the satisfaction of the lessor." It is admitted that the Messrs. Edmondson erected these buildings at considerable expense, which are not only not prohibited by the lease, but they are the consideration for granting the lease. They were in the contemplation of Lord Pembroke. Then, what is the demise?

I pass over the argument that the premises are not within the

village of Dundrum as not being worthy of notice. They are so described in the former lease. The demise is of 4 acres, together with the buildings and offices thereon, known as the Manor Mill Laundry. The plot contains two green fields, through which the mill-stream flows, which is reasonably necessary for the use of the premises demised, having regard to the subject-matter. It is a demise of the laundry and its adjuncts. Then, there is the proviso that the lessees shall not, without the consent of the lessor, build on the demised premises any wooden sheds, or wood-roofed buildings, or any other buildings or erections whatsoever. These are excluded because they would be prejudicial to the property. What is not prejudicial to the property comes next—"except summer-houses and greenhouses, and except further buildings, or alterations to existing buildings, which may be required for the use of the laundry business now carried on upon the demised premises, or such other business as may be hereafter carried on upon the said demised premises."

Therefore, under this lease it was contemplated that any extension or additional building necessary for the use of the laundry might be made, and the landlord could not object; and they might cover the whole of the premises. Then the lessees are to be at liberty to build not more than two dwelling-houses of the value of not less than £500 each, and gate-lodges for them if built. These were never built, and therefore these two green fields still remain part of the premises substantially occupied by the laundry. The lease then goes on to provide that the lessees shall not carry on any business on the demised premises, save that of a public laundry, without the permission of the lessor.

Taking up the three grounds on which Mr. Conner relied, I hold (1) that the premises were buildings used for business purposes; (2) that they are within the village of Dundrum; and (3) that there is no question but that the proposed improvements will add to the letting value of the holding. What can be more suitable than the proposed addition to the laundry, which, by the terms of the letting, may be made? It is said they will be prejudicial to other property of the landlord—the labourers' cottages, and the premises occupied by the cabman. It is absurd to suppose that the cabman or the tenants of the adjoining cottages would be

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injured by the addition, shown on the model, that is proposed to be made. The owners of the adjoining property on both sides have told us they do not object. The only evidence the other way is the opinion of the engineer of the Pembroke estate. This is a re-hearing, and not a case stated, and we are not bound by the inferences of fact which the Recorder draws.

I am of opinion that this holding of 4 acres is a holding within the 17th section; that the application is within the Act; and that the objections to it are untenable and unreasonable.

We must allow the appeal, with costs.

HOLMES, L.J. :—

In this case I entertain no doubt. I concur in the judgment of the Court, reversing the decision of the Recorder. As to the first point, it seems to me perfectly plain that these premises are in the village of Dundrum; and if that were the only point, we probably would never have heard of the case.

The important point in this, and possibly in other cases of holdings from Lord Pembroke, is, whether this holding is excluded from the Act by reason of the two acres demised with it, on which there are no buildings. We must look at all the circumstances of the case. We find that an essential part of the demise is a large commercial undertaking, with extensive buildings, erected at a cost of £6000, with a pond, stream, and weirs for the water supply to the laundry. These would cover more than one acre. Then there is a dwelling-house on the premises, which would require some ground as an accommodation. Now if, in addition to the main subject of the demise, you have two acres of land, does that take the case out of the Act? I think not. There is a provision in the lease for the extension and improvement of the laundry, to enable which to be carried out this adjunct would be necessary.

As to the proposition that the extension which is proposed would be injurious to the landlord, I cannot see how that can be sustained, having regard to the lease of 1897. I do not go outside it. I go to the lease, and I find in it that while there is a restriction put on buildings of many kinds without the consent of the lessor, there is an exception of what might add to the amenities of the premises, such as summer-houses or greenhouses,

and what would be required for the extension and improvement of the laundry itself in a proper way. This provision in the lease is, to my mind, the best evidence that such extension would not injure the landlord, or depreciate the value of his other property in the neighbourhood.

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CHERRY, L.J. :—

I concur. The only question on which I had any doubt was whether the premises as demised constituted a "holding" within the definition contained in the 17th section of the Act. But we have authorities under the Lands Clauses Acts which lay down that the word "house" is not necessarily confined to the building itself, but may include a piece of land unbuilt upon, which forms a reasonable adjunct to the house. The strongest case is *Barnes v. Southsea Railway Co.* (1). There a house and garden were surrounded by a wall, a gate in which opened into a paddock, surrounded by a high hedge. The back road to the house passed through the paddock to a public road outside the fence of the paddock, and it was held that the paddock was part of the house within section 92 of the Lands Clauses Act, 1845. Here, in a laundry business, certain small portions of land would be a reasonable adjunct for the use of the horses employed in the vans. They might be used for many other purposes in connexion with the establishment, as Lord Justice Holmes has pointed out. It might as well be argued that the existence of the mill-pond would exclude the case from the Act; but obviously a mill-stream and pond would be necessary for the working of the laundry.

Next, the point was made that the proposed new building would not be suitable to the character of the holding. This is a strange argument, and is completely answered by the provisions of the lease itself, which distinctly contemplate the erection of buildings such as are now proposed to be erected.

The last point relied on was that the buildings would diminish the value of the adjoining property of the landlord. But the adjoining proprietors on both sides, Mr. Low and Mr. Richardson, gave positive evidence that the proposed addition would not

Appeal. 1909. prejudicially affect their premises, and I see no reason to disbelieve them. It is gravely suggested that the æsthetic taste of the cabman and the labourers in Lord Pembroke's cottages (the other *Applicants*; adjoining occupiers) would be offended by a ferro-concrete structure, and would prefer something more ornamental! The suggestion is really absurd. The only point made as to the adjoining property at all reasonable was the suggestion that the value for building purposes of a small portion of land, suitable for building, upon one side of the laundry premises would be diminished. It appears, however, that this piece of land, which might long since have been used for building, has never been built upon, and is merely waste land. I cannot see that it will be in any way diminished in value by the proposed extension of the laundry premises.

Respondent.
Cherry, L.J.

I think Lord Pembroke's objection was most unreasonable.

Solicitors for the appellants : *Read & Macnab.*

Solicitor for the respondent : *Martley.*

W. G.

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IN THE MATTER OF AN ARBITRATION BETWEEN BRIEN AND BRIEN (1).

Nov. 8, 17.

Arbitration—Award—Setting aside—Misconduct of arbitrator.

A submission to arbitration provided that the arbitrators should fix the value of a farm worked in partnership by the parties to the arbitration, and owned by them, and should also decide which of the said parties should have the first offer of purchasing the farm at that valuation. For the purpose of the arbitration each of the arbitrators was, with the assent of the parties, requested, "on behalf of the party whom he represented, to make a separate valuation of the farm." One of the arbitrators, accompanied only by the party who had nominated him, walked over and inspected the farm for the purpose of valuing it, and did not again inspect it. When the arbitration was held, the arbitrators, after comparing their valuations, and without calling any

(1) Before BOYD, and WRIGHT, JJ.

evidence or being requested to do so, made and published their award, by *K. B. Div.* which they fixed the value of the farm. On a motion to set aside the award :— 1909.

Held, that the award should be set aside, on the ground of misconduct on the part of one of the arbitrators in inspecting the farm in company with one party, and in the absence of the other or of any person representing him. *In re* ARBITRATION BETWEEN BRIEN AND BRIEN.

Walker v. Frobisher (6 Ves. 70) followed.

MOTION to discharge a conditional order confirming an award.

The parties to the award, John Brien and Henry Brien, were joint owners of a farm held under a judicial tenancy, and of the stock and farming implements thereon, subject as to the entire to an annuity of £30 payable to their sister Sarah Brien for her life or so long as she remained unmarried. John Brien was the owner of five undivided eighths of the farm, stock and implements, and Henry Brien owner of three undivided eighths of the same.

On the 6th September, 1904, they executed a partnership deed, by which they agreed to work the farm as partners and to divide the profits in proportion to their respective shares therein. The deed contained a clause providing that, "if at any time during the continuance of the partnership . . . any dispute, difference, or question should arise between the partners touching the partnership, or the rights or liabilities of the partners under the deed, every such dispute, difference, or question should be referred to two arbitrators or their umpire, pursuant to the Common Law Procedure (Ireland) Act, 1856."

By an agreement, dated the 15th March, 1909, and made between John and Henry Brien, after reciting that they had agreed to dissolve the partnership created by the deed of 6th September, 1904, and that disputes and differences were then pending as to the terms of the dissolution and the distribution of the partnership assets, it was agreed (*inter alia*) as follows:—

"(1.) All matters in dispute, and all questions arising out of or in any way relating to the partnership heretofore existing, and to the dissolution thereof, shall be referred to the arbitration of Ebenezer Smith and Michael Dodd; or, if and so far as they may be unable to agree (and as to such matters only), to their umpire to be appointed in writing under their hands before proceeding in the reference."

"(10.) The said arbitrators or their umpire shall determine

K. B. Div. what in their or his opinion is the fair valuation of the entire
 1909. of the said farm, together with the stocks, crops, and farming
In re implements thereon, and shall further determine which of the
 ARBITRATION said partners shall have the first offer of taking over the same at
 BETWEEN such valuation.
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“(11.) Neither of the parties shall bring or prosecute any action against the other, or against the arbitrators or the umpire, or either of them, for or in respect of the said matters in difference, or any or either of them, or for or in respect of the said award to be made in pursuance of the submission.”

It was also provided that the agreement and the award to be made thereunder might be made a rule of Court, and that the arbitration should in all respects be conducted according to the provisions relating to arbitrations in the Common Law Procedure (Ireland) Act, 1856, and should also have all the incidents and consequences of an arbitration under that Act. The other clauses of the agreement are not material for the purposes of this report.

It appeared from the affidavits that Ebenezer Smith was nominated by John Brien, and Michael Dodd by Henry Brien.

On the 26th March duplicate letters, addressed to the arbitrators jointly, were sent to each of them by the solicitors acting for John Brien. These letters, after informing the arbitrators of their appointment, of the terms of the reference, and giving particulars of the tenure of the farm in question, and of the rent, rates, and charges thereon, concluded as follows :—

“You are therefore requested, on behalf of the party whom you represent, to make separate valuations of—(1) The selling value of the interest in the said farm; and (2) the value of the crops, stock, and farming implements.

“The valuations are to be returned to us in sealed envelopes, and not to be disclosed until the holding of the arbitration, when they will be opened. When the valuations are received, we will fix a day for the hearing of the arbitration.”

These letters were shown to, and approved of by, the solicitor acting for Henry Brien, before they were sent to the arbitrators.

On the 25th March John Brien was notified by Smith that the latter intended to visit the farm in question on the following day; and, shortly after he had received this notice, John Brien

met Henry Brien in the cattle market in Dublin, and informed him of Smith's intention. It was sworn by John Brien, and not denied, that upon that occasion he asked Henry Brien to come to the farm to meet Smith, and that he promised to do so. Notice of Smith's intended visit was not given to Dodd. Henry Brien failed to keep this appointment; and when Smith arrived at the farm on the 26th March, he walked over and inspected the farm accompanied only by John Brien, the inspection lasting about three hours. It was sworn in an affidavit made by Sarah Brien, who was at the farm when Smith arrived, that she asked the latter if he required the attendance of anyone to represent Henry Brien, and that he replied that he considered it unnecessary. This statement was not denied by Smith.

On the 2nd April both arbitrators visited the farm, when John and Henry Brien were both present. Neither of the arbitrators inspected the farm on that occasion, Dodd stating that he did not consider it necessary, as he was acquainted with the lands and buildings, having twice valued the farm for the purpose of proceedings in the Land Commission to fix a fair rent. The last of these proceedings was in 1904. Smith considered that the inspection which he had made on the 26th March was sufficient for his purpose.

Prior to the arrival of the arbitrators, John Brien had arranged the farming implements for their inspection, and had also made out two lists of the live stock, furniture, and implements on the farm, which lists were used by the arbitrators in making their valuation. In his affidavit he stated that Henry Brien knew of this, and did not then object. Henry Brien denied having ever known that the lists were either made out by John, or that they were used by the arbitrators.

On the 5th April Smith sent in his valuation, by which, after deducting £500 as the capital value of the annuity to Sarah Brien, he valued the farm, stock, implements, and furniture at £1913 1s. 6d. On the 10th April, Dodd sent in his valuation, in which he stated that he had valued the farm as "subject to an annuity of £30." His valuation of the farm, &c., amounted to £2005 2s. 6d. In both valuations each item of stock, &c., was separately dealt with.

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After one adjournment, the arbitration was held on the 26th May, when the arbitrators agreed in fixing the value of the farm, stock, &c., at £1910, and decided that John Brien should have the first offer of purchasing at that price.

On the 22nd June the submission to arbitration was received and made a rule of Court; and on the same day a conditional order was made confirming the award unless cause were shown to the contrary within six days from the service of a copy of the said award and of the order.

With reference to the occurrences of the 26th March, John Brien's affidavit contained the following statement:—"I did nothing more than point out to the said Ebenezer Smith, at his request, the farm, implements, and stock which formed the subject-matter of the arbitration . . . I repudiate in the strongest terms the suggestion that I influenced the said Ebenezer Smith on that or on any other occasion in reference to his valuation."

Smith's affidavit contained the following passage:—

"I say that on no occasion did I discuss the subject-matter of the reference with the said John Brien, nor did he in any way influence me as to my valuation."

Ronan, K.C. (with him *Russell*), for Henry Brien:—

The award ought to be set aside on the ground of Smith's misconduct in inspecting the farm in the company of one of the parties and in the absence of the other, or of any person to represent him. An arbitrator must not receive evidence from one party in the absence of the other: *Walker v. Frobisher* (1); *Re Tidswell* (2); *Dobson v. Groves* (3); *Re Plews and Middleton* (4). "An arbitrator greatly errs if he in the minutest particular takes upon himself to listen to evidence behind the back of any of the parties to the submission": *Drew v. Drew* (5); and see also the observations of Lord Eldon in *Fetherstone v. Cooper* (6), and of Turner, L.J., at p. 168 of the report of *Haigh v. Haigh* (7). These authorities also show that the Court ought not to entertain

(1) 6 Ves. 70.

(2) 33 Beav. 213.

(3) 6 Q. B. 637.

(4) *Ibid.* 845.

(5) 2 MacQ. 1.

(6) 9 Ves. 67.

(7) 3 DeG. F. & J. 157.

the question whether an arbitrator has or has not been influenced by *ex parte* statements; if he has received such evidence, unless the objection to his having done so be waived, the award cannot stand.

The fact that Henry Brien was aware of Smith's action, and did not remonstrate until after the award was made, does not prevent him from relying on it now: *Dobson v. Groves* (1).

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Chambers, K.C., and *J. Andrews*, for John Brien :—

We submit that the authorities cited have no bearing on the facts of this case. The arbitrators were, with the knowledge and approval of both parties, requested to make *ex parte* valuations of the farm, on behalf of the parties whom they represented. These valuations were intended to be preliminary to the holding of the arbitration. Henry Brien not only had notice of Smith's intended visit, but could have tendered evidence, had he so desired, when the arbitrators met on the 2nd April, or at their sitting in Dublin. As he did not do so, and as he did not on either occasion make any objection to Smith's conduct although then aware of it, he should be taken to have waived the objection on which he now relies: *Russell on Arbitration*, 6th ed., p. 203.

Russell replied generally.

At the conclusion of the arguments, counsel for both parties agreed that the Court should decide upon the validity of the award, and, in the event of the Court coming to the conclusion that there had been misconduct on the part of the arbitrators, that the award itself should be set aside.

Boyd, J. :—

Nov. 17.

The only question of importance in this case is, whether there has been misconduct on the part of Ebenezer Smith, one of the arbitrators. If there has been misconduct, the law on the point is clear. When once they enter on an arbitration, arbitrators must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of

(1) 6 Q. B. 637.

K. B. Div. the effect which misconduct on their part had in fact upon the
 1909. result of their proceedings, but of what effect it might possibly
In re have produced. It is not enough to show that, even if there was
 ARBITRATION misconduct on their part, the award was unaffected by it, and was
 BETWEEN in reality just ; arbitrators must not do anything which is not in
 BRIEN AND itself fair and impartial.
 BRIEN.
 Boyd, J.

The parties to these arbitration proceedings were owners of a valuable farm which they worked in partnership—John Brien being the owner of five-eighths and Henry Brien of three-eighths of the farm. The deed of partnership was dated 6th September, 1904, and contains a provision that, in the event of any dispute or question arising as to the dissolution of the partnership thereby created, it should be referred to two arbitrators or their umpire pursuant to the Common Law Procedure Act (Ireland), 1856. A question having arisen as to the dissolution of the partnership in question, the two partners John Brien and Henry Brien, by an agreement dated 15th March, 1909, referred the matter to the decision of two arbitrators, or, in the event of a disagreement, to an umpire to be appointed by them ; and, by the same instrument, John Brien nominated Ebenezer Smith, and Henry Brien nominated Michael Dodd, to act as arbitrators. One of the questions submitted to them was as follows :—

“To determine what in their opinion was the fair value of the said farm, together with the stocks, crops, and farming implements thereon, and to determine which of the partners should have the first offer of taking over the same at such valuation.”

Their appointment was communicated to the arbitrators by duplicate letters dated 26th March, and written by Messrs. J. & J. Galloway, the terms of which were submitted to and approved of by both parties. By these letters each of the arbitrators was requested on behalf of the party whom he represented, to make a separate valuation of the selling value of the farm, and also of the crops, stock, and farming implements, which valuations were to be returned in sealed envelopes to Messrs. Galloway, and not disclosed until the holding of the arbitration. These letters were received by the arbitrators on the 27th March.

Now the evidence shows that on 26th March, and therefore before he had received a formal notification of his appointment,

Smith visited the farm, and, in company with John Brien alone, went over it, and made an examination so exhaustive that it occupied four hours. It has been argued that there was nothing wrong in this, since Henry Brien was aware that Smith intended to visit the farm on that day; but it is clear that Smith went over and examined the farm in the absence of Henry Brien, or of any person representing him. The only evidence of notice to Henry Brien is the statement of John Brien that, on 25th March, at the Dublin cattle market, he casually told Henry that Smith would visit the farm on the following day. No notice whatever appears to have been given to Dodd, and Smith did not request the attendance of anyone to represent Henry Brien while he—Smith—was examining the farm. The idea of an arbitrator making a valuation under such circumstances appears to me to be contrary to all principles of justice and fair play. It is admitted that the only occasion on which Smith examined the farm was on the 26th March.

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Both the arbitrators visited the farm, though they did not inspect it, on 2nd April; and on this occasion Henry Brien was present. Now, in the meantime, what had John Brien been doing? He had arranged the farming implements for the inspection of the arbitrators, and had made out a list of them; but Henry Brien swears that he was not aware till after the arbitration that this list had been made out, or that it had been given to the arbitrators. After some adjournments, the arbitration was finally held on May 26th, when the arbitrators fixed the value of the farm, crops, stock, and implements at £1910, and decided that John Brien should have the first offer of purchasing them at that price. The justice of the latter part of the award is not challenged, since it appears that Henry Brien is a person of unsteady habits, and has been in a home for inebriates.

I am of opinion that the action of Smith in examining the farm in the absence of one of the parties or of any representative on his behalf amounts to misconduct in the arbitration, and the question arises, what ought now to be done?

The law on this subject was settled by Lord Eldon, C., in 1801, in the case of *Walker v. Frobisher* (1), the marginal note of

(1) 6 Ves. 70.

K. B. Div. the report being as follows :—"Award set aside : the arbitrator
1909. having received evidence after notice to the parties, that he would
In re receive no more ; in which they acquiesced."

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In delivering judgment in the case Lord Eldon said :—
"The award cannot stand. The arbitrator . . . is, I am well
assured, a most respectable man : but he has been surprised into
a conduct ; which upon general principles must be fatal to the
award. . . . He had examined different witnesses at different
times in the presence of the parties. He recommended them
not to produce any more witnesses. To that recommendation
they accede. . . . After this he hears those other persons ; and he
admits, he took minutes of what was said. It did not pass as
mere conversation. It does not appear, that he afterwards held
any communication with the other party ; or disclosed what
passed to him : but the arbitrator swears, it had no effect upon
his award."

Now in the present case Smith swears that he has not been
influenced by anything which passed between him and John Brien
on March 26th ; and John Brien swears that he said nothing to
influence Smith in estimating the value of the farm : but the
authority which I am now citing shows how Lord Eldon regarded
a case of that kind. The rest of his judgment is in the following
terms :—

"I believe him." (*i.e.* the arbitrator.) "He is a most respectable
man. But I cannot from respect for any man do that, which I
cannot reconcile to general principles. A Judge must not take
upon himself to say, whether evidence improperly admitted had
or had not an effect upon his mind. The award may have done
perfect justice ;" (as, very possibly, may be the fact in this case)
"but upon general principles it cannot be supported."

In a later case of *Fetherstone v. Cooper* (1) Lord Eldon, after
reiterating the opinion expressed by him in *Walker v. Frobisher* (2),
said :—"Arbitrators must understand, that they are acting cor-
ruptly, acting as agents : also, where they take instructions, or
talk with one party in the absence of the other, the Court ought
to be inclined to set aside the whole. There ought to be the

(1) 9 Ves. 67.

(2) 6 Ves. 70.

fullest communication: Yet the party complaining ought to be free from blame."

Those words apply exactly to the facts of the case now before us, and show that the award ought to be set aside.

There are certain other facts in the case which cannot be regarded as satisfactory. Dodd, the other arbitrator, did not examine the farm at all, the reason given by him being that he had on two previous occasions made a valuation of it in connexion with proceedings to have a fair rent fixed upon it in the Land Commission Court. But the last occasion on which a fair rent was fixed was in 1904, and the farm might have altered greatly in value in the succeeding five years.

Another fact is that a sister of the parties to these proceedings had a charge of £30 per annum on the farm for her life. She is now about fifty years of age; but no evidence appears to have been taken as to the capital value of this charge. Smith estimated it off-hand at £500, and Dodd's valuation of the farm is stated to be made "subject to a yearly annuity of £30," but without any statement of its capital value. I consider that to be a most unsatisfactory method of dealing with the matter.

I am of opinion that the award must be set aside; but, as no protest was made by Henry Brien until after the arbitration was held, I think the parties should abide their own costs of this motion.

WRIGHT, J. :—

I agree. I think the motion should be granted on the ground of misconduct on the part of Smith in inspecting the farm for the purpose of his valuation in the absence of Henry Brien, or of any person representing him. I regret having to do this; but I feel myself coerced to do so by the authorities to which Boyd, J., has referred. I think there has been no deliberate or conscious unfairness practised; but the conduct of Smith appears to me to have been improper and inconsistent with the judicial character of an arbitrator.

The motion only asks to have the conditional order confirming the award set aside: but having regard to the basis upon which the case has been argued, I think it will be more satisfactory for

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K. B. Div. all parties that we should also decide upon the validity of the 1909. award itself.

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THE COURT made an order discharging the conditional order confirming the award, and also set aside the award.

Solicitor for Henry Brien : *William Seddall.*

Solicitors for John Brien : *J. & J. Galloway.*

J. C. W.

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1909.

TAYLOR, APPELLANT; NIXON, RESPONDENT (1).

Feb. 16.
Dec. 20.

*Justices—Sale of Food and Drugs Act, 1899, s. 16—“ Wilfully ”—Mens rea
—Manager of public-house—Responsibility of proprietor—Obstruction of
inspector.*

Section 16 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), enacts that “ any person who wilfully obstructs or impedes any inspector . . . in the course of his duties under the Sale of Food and Drugs Acts, or, by any gratuity, bribe, promise, or other inducement, prevents or attempts to prevent the due execution by such inspector . . . of his duty under those Acts,” shall be liable on summary conviction to the fines therein mentioned :—

Held, that the offence created by the section is one of intentional misconduct, involving personal *mens rea*.

Where an inspector of food and drugs required a sample of whiskey from a particular bottle, and the husband of the publican, who the Justices found was at the time acting as her manager, while pretending to uncork it, deliberately, as the Justices found, broke the bottle ; but the Justices did not find that he did so at the request or with the authority or connivance of his wife, nor was there any evidence to that effect :—

Held, that a conviction against the wife for wilful obstruction of the inspector could not be sustained.

CASE STATED at the instance of the appellant, Mrs. Florence A. E. Taylor, by the Justices of the county of Antrim, at Lisburn Petty Sessions, under the 21 & 22 Vict. c. 43.

The case was as follows:—

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At a Petty Sessions, holden in and for the Petty Sessions District of Lisburn, in the county of Antrim, on the 19th day of November, 1908, before the undersigned Justices of the Peace, acting in and for the said Petty Sessions District of Lisburn, in the county of Antrim, Florence A. E. Taylor, the above-named defendant, was charged "That on the 9th day of October, 1908, at Lissue, in the said district, and in the county of Antrim, you, the said defendant, did wilfully obstruct the complainant in the course of his duties as inspector of food and drugs." And the said parties being then present, the charge was duly heard before us, and upon such hearing we convicted the defendant, and ordered that she should pay for fine twenty-one shillings, and for costs two shillings and sixpence forthwith, and, in default of payment, to be imprisoned in Belfast Gaol for the period of fourteen days, without hard labour, unless said sums be sooner paid.

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And whereas the said Florence A. E. Taylor, the defendant, hath, pursuant to the provisions of the before-mentioned statute, given us notice, and required us, to state and sign a case setting forth the facts and grounds of our determination upon the hearing of said complaint, in order that she might take the opinion of the said Court thereon.

Now we, the said Justices, pursuant to the said notice and the provisions of the statute, do hereby state and sign such case as aforesaid as follows:—

At the hearing of the said complaint, Mr. T. M. Greer, solicitor, appeared for complainant, and Mr. A. J. Lewis, solicitor, for defendant.

Sergeant J. W. Nixon, complainant, deposed:—"On the 9th October, 1908, I visited the premises of Florence A. E. Taylor, publican, Lissue, to carry out my duties as inspector of food and drugs. I cycled there, and had my usual bag containing bottles for samples, &c., strapped on the cycle. I arrived at about 9.15 a.m. I saw the defendant's husband outside the premises doing something to a horse. I dismounted, had a conversation with him, and proceeded to unfasten my bag from the cycle. I understood that defendant's husband (Mr. Taylor) was in the police

K. B. Dir. force some years previously. He (Taylor) hurriedly entered the
1909. house, and I followed him hurriedly. He went behind the
TAYLOR, counter." Mr. Lewis here objected. He was here to defend
Appellant : Florence A. E. Taylor on a specific charge, and had nothing to
NIXON, do with anyone else. What Mr. Taylor did had nothing to do
Respondent. with the case. Mr. Greer, "We will see about that later on." Wit-
ness (continuing)—"Taylor went behind the counter, took a pint
bottle off the shelf, and put it away in a corner out of my sight.
The bottle was about three-quarters full. I told him I had come
to take a sample of whiskey. He said he knew that. Taylor
told me on a previous occasion that he had served behind the bar,
and he swore it in this Court some time ago. He (Taylor) filled a
jug from a hogshead. I told him I did not want that. I pointed
to the bottle on the shelf, and said I wanted it. He said there
was no whiskey in it, only coloured water. I then drew his
attention to the fact that it was labelled 'the best quality
whiskey.' He then put down another bottle, and took this one
(produced) in his hand. I knew what was in it because I smelt it.
Taylor then made to draw the cork, advanced his head as if to
smell it, and dropped it, deliberately I say, smashing it in pieces.
I then went round behind the bar and lifted up one of the broken
pieces (produced), which contained the dregs of whiskey. Taylor
picked up the small label with the words 'best whiskey,' and
began to rub it between his finger and thumb. Having regard
to his conduct, it was impossible for me to get a sample of the
whiskey in the bottle." Cross-examined by Mr. Lewis—
"Although there were other bottles on the shelf, I did not ask
for one of them. They were sealed. Mrs. Taylor was not pre-
sent at the time. I only saw her when I was leaving. I had no
conversation with her. I saw a horse outside. Taylor did not
tell me what he was doing to the horse. There was no talk
about the whiskey being used for rubbing the horse's legs. If I
took all the samples offered me by publicans and others to be
analysed, there would be little use of my spending the public
money." To Mr. Greer—"I don't allow the publicans to select
the samples I want. What I mean by saying that Mr. Taylor
advanced his head is, that I suppose he did not want the contents
of the bottle to fall on his clothes."

Mr. Greer, solicitor for complainant, and Mr. Lewis, solicitor for defendant, having addressed the Court.

For the defence, William John Taylor deposed—"On the day mentioned I was out at the front of the house rubbing the horse's leg with whiskey. The horse kicked me against the wall, and I was a bit shaky. I brought the bottle I was using on the horse into the house, and put it on the shelf. The sergeant came in and asked for three naggins of whiskey. I drew a pint out of a keg and put it down on the counter. The sergeant pointed to another bottle, the one I had been using on the horse, and asked what was in it. I said it was not for sale, but that he could have it if he wanted it. I took the bottle from the shelf, and it accidentally fell out of my hand. I will pledge my oath that it was a pure accident. I was willing to give the sergeant any whiskey that was in the shop." Cross-examined by Mr. Greer—"It was whiskey that was in the bottle, the same as was in the other bottles. I have one here" (produced). "I put it out of sight because I had been using it on the horse. I did not propose selling it to anyone. I manage the house for my wife when she is not here."

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And whereas upon said hearing we found as a fact that the said William John Taylor, the husband of the said defendant, was acting as her manager of said public-house; and that he, when acting as such manager, deliberately broke the bottle of whiskey, and obstructed the complainant while in the course of his duty as inspector of food and drugs; and we convicted the defendant and ordered her to pay a fine of twenty-one shillings, and costs, two shillings and sixpence, and in default fourteen days' imprisonment.

And hereupon the judgment of the said Court is requested as to whether we the said Justices were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

Hanna, for the appellant.

Harrison, K.C., and *Clarke*, for the respondent.

The arguments, which were addressed to the effect of the

K. B. Div. word “wilfully” in section 16 of the Sale of Food and Drugs
 1909. Act, 1899, the authorities cited, and the statutes containing
Taylor, similar provisions referred to, are comprehensively reviewed in
Appellant: the judgment of Mr. Justice Gibson.
Nixon,
Respondent.

Dec. 20.

GIBSON, J. :—

The question in this case is whether wilful obstruction, which (with bribery) is made an offence by section 16 of the Act of 1899, is of such a character that, if committed by a manager, it can be imputed to a master, and make the latter guilty, notwithstanding that he has no knowledge of his representative's wilful misconduct. The defendant's husband, managing her public-house, during her absence from the bar, was asked by an inspector of food and drugs for a sample of whiskey from a bottle. Pretending compliance with the request, he took the bottle and let it fall, as he alleged, accidentally. The act was found by the Justices to have been deliberate, and to amount to wilful obstruction. There was no evidence of authority, knowledge, or connivance, on the wife's part. She was convicted as being responsible for her manager's misconduct. On the facts proved the owner could have been convicted for refusing to sell under section 17 of the Act of 1875—*Farley v. Higginbotham* (1)—as that section does not make *mens rea* or wilfulness part of the offence. Section 16 of the Act of 1899 contemplates a different kind of offence and personal criminality. Before I discuss the section and the authorities, I will say a few words on the offences created by the code. They are of various types. In some, the proprietor can escape if he proves want of knowledge, and that he has used due diligence : Act of 1875, s. 5 ; Margarine Act, 1887, s. 5. Under section 6 of the Act of 1875 an innocent master is liable even for the act of a servant who has stolen portion of the article offered for sale, and has adulterated it to conceal his theft ; and it has been ruled that an innocent employee, selling for his master an adulterated article, commits an offence within the section. A third class of offence is found in section 27 of the Act of 1875, forgery, &c., and here the offence is clearly personal to the offender, and could not

be imputed to an innocent master. Even the clause in the section which omits "wilfully" includes personal *mens rea*: *Derbyshire v. Houlston* (1). K. B. Div.
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Section 16 of the Act of 1899 applies to all the enactments in the code; and apart from the general principle that a master is not criminally answerable for unauthorized and wilful misconduct of his servant, there are two weighty arguments against applying the section to create constructive criminality. The first is that when Parliament has, in this very code, expressly, in certain cases, exonerated an innocent proprietor for dishonest acts for which he was not morally to blame, it is not likely that the Legislature would have made him criminally responsible in every case without exception, and without possibility of escape, no matter how careful he was, for wilful offences under section 16, which are of a character peculiarly defying foresight and precaution on the master's part. That a servant committing forgery or any other wilful offence within section 27 of the Act of 1875, and resorting to bribery or wilful obstruction within section 16 of the statute of 1899, in order to conceal his crime, should make his innocent employer, who could not be convicted in respect of the primary main offence, constructively a criminal in respect of the second and subordinate offence, seems quite contrary to justice and reason.

The second argument is, that though bribery may found civil liability against an employer, in its criminal aspect it cannot be imputed to such employer who has not authorized or connived at it: *Hamlyn v. Houston* (2). Bribery, dealt with in section 16, would support a charge of indictable common law conspiracy: *Reg. v. De Kromme* (3); and is now a statutory crime: 6 Edw. 7, c. 34. If an innocent master could not be affected with constructive criminality for unauthorized bribery by his servant, it would seem difficult to interpret the offence of wilful obstruction, linked with it in the same section, as carrying with it wider penal responsibility.

But on broad grounds of principle, wilful obstruction describes an offence personal to the delinquent. The section deals with

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(1) [1897] 1 Q. B. 772. (2) [1903] 1 K. B. at p. 86. (3) 17 Cox C. C. 492.

K. B. Div. acts essentially criminal in character: *Rawson v. London Tramway* 1909. *Company* (1) and not acts merely prohibited under penalty: *TAYLOR, Appellant; NIXON, Respondent.* *Davies v. Harvey* (2). In *Roberts v. Woodward* (3). Pollock, B., observes—"I know of no instance in which a master is criminally liable for the act of his servant unless he is made so by statute, or unless the act of the servant is from its very nature obviously the act of the master." Examples of such statutory liability for acts of servants will be found in 53 & 54 Vict. c. 21, s. 11 (as to obstruction of revenue officers), and in the Pawnbrokers Act, 1872, section 8, in neither of which does "wilfully" occur. "Wilfully" is of frequent occurrence in legislation, sometimes by itself, sometimes associated with other words: e.g. "knowingly and wilfully": Tramways Act, 1870, c. 78, s. 51 (where the preceding sections use "wilfully" alone); the Companies Act, 1862, section 25, subsect. 3, and section 27; the Act, 1861, c. 96, section 76; 43 & 44 Vict. c. 35, s. 3. "Wilfully and maliciously," "wilful misconduct," and "wilful obstruction," in case of the police and sanitary officers, are familiar expressions. The word in a context like the present usually denotes conscious wrong-doing: *Meirelles v. Banning* (4); *Reg. v. Badger* (5); *Smith v. Barnham* (6); *Lowdens v. Keaveney* (7); *Re Mills* (8). Take an illustration or two; obstruction may cover a great variety of illegal acts—many of a sudden, impulsive, and fortuitous character—e.g. assault, &c., and it may take place at a fair or market as well as in business premises. If a servant dishonestly abstracted portion of his master's milk, entrusted to him for sale, and filled up the vessel with water, in order to hide his theft, the master would be liable under section 6 of the Act of 1875 for the sale of the adulterated milk. Could the master be held responsible for wilful obstruction of an inspector by the fraudulent servant, who, to escape detection, smashed the vessel, or assaulted the officer?

Mere refusal to sell a sample is an offence under section 17 of the Act of 1875; but such refusal might not necessarily prove wilful obstruction. Ignorance of the official character of the

(1) 17 Cox C. C. 691.

(2) L. R. 9 Q. B. at p. 440.

(3) 25 Q. B. D. 415.

(4) 2 B. & Ad. 909.

(5) 6 E. & B. 137.

(6) 1 Ex. D. 419.

(7) [1903] 2 I. R. 91.

(8) 40 Ch. D. 14.

person asking for the sample; honest belief that a person asking for a sample of spirits was under the influence of drink; apprehension by a boycotted trader that the person seeking admission into his house (then shut and barred) was attempting to enter by the ruse of buying—might possibly deprive the act, though intentional, of any wrongfully wilful character. Wilfully neglecting a child is met by proof of want of means; wilful trespass, by proof of reasonable belief as to the right to enter. One of the last cases on the subject is the *Poplar Case* (1). Without an assisting context “wilfully” conveys usually personal *mens rea*.

I now turn to the three classes of authorities relied on by the prosecutor's counsel. The first consists of cases under the Licensing Acts, where “knowingly” (as in *Emary v. Nolloth* (2)), or its equivalent, is made part of the offence, and the knowledge of the owner's representative is imputed to his employer. These licensing cases stand on a special footing, as pointed out in *Massey v. Morris* (3), and in the case of shipping and in the case of mines, the owner is not personally answerable for his representative's default: *Dickenson v. Fletcher* (4), though he is civilly responsible in damages: *David v. Britannic Merthyr Coal Co.* (5). The imputation of knowledge in the public-house cases is like that in the case of a savage dog, where knowledge is part of the cause of action. But both in statutes and in case law, *sciens* is not the same as *volens*, and this is shown by the addition of “wilfully” to “knowingly” in many enactments such as I have already referred to. The Companies Act, 1862, is a useful illustration when we compare section 27, and section 25, sub-sect. 3, “knowingly and wilfully” with section 38 of the Act of 1867, which only speaks of “knowingly.” The speech of Lord Lindley in *Macleay v. Tait* (6) shows the distinction. A contract might not be disclosed in a prospectus from forgetfulness, oversight, or belief that it was immaterial. Such non-disclosure might be “knowing” though innocent, but would it be “wilful”? In a case like the present, where the section describes and punishes what is an

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(1) [1905] 1 K. B. 728.

(2) [1903] 2 K. B. 268.

(3) [1894] 2 Q. B. 412.

(4) L. R. 9 C. P. 1.

(5) [1909] 2 K. B. 146.

(6) [1906] A. C. 24.

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act of deliberate personal misconduct, I cannot see any indication of intention to fix the innocent employer with constructive penal responsibility. Section 17 of the Act of 1899 does not aid the prosecutor. There are many offences in the code for which there may be a conviction without any personal delinquency. The section cannot be construed as recognizing by implication criminal responsibility in the master for his servant's criminal acts, such as forgery under section 27 of the Act of 1875.

The second and chief authority relied on for the prosecution was *Attorney-General v. Siddon* (1); when examined it seems quite beside the point. Liability was there based on the inference of actual authority, and not on the servant's act as done in the course of duty, in which view the absence of authority would be no defence to a civil action.

The proceeding was a civil proceeding on two revenue charges (1) for harbouring tobacco; (2) for fraudulent misapplication of excise permits. The defendant was found guilty on both. As to the first charge, he did not question the verdict; as to the second, he disputed liability on the ground that there was no evidence of authority to his servant to attach the permits. The Court held that there was evidence of authority, and that both parties were dishonest. The judgments of Bayley, B.—especially the last page—and of Vaughan, B., demonstrate that the Court held that real authority was proved; they did not act on any idea that the master could be fixed with responsibility for his servant's acts as done in course of duty without his master's authority. The civil liability of a master for all acts done by his representative in course of duty, notwithstanding that such acts are in fact unauthorized or prohibited, is required by the necessities of every-day life and business intercourse; but criminal responsibility is quite different. The general rule is, that an employer is not criminally answerable for his servant's unauthorized acts: *Hardcastle v. Bielby* (2). To this there are many exceptions; but I cannot discover any example of constructive criminality having been extended to such offences as are punished by section 16.

(1) 1 C. & J. 230.

(2) [1892] 1 Q. B. 712.

The third type of case cited for the prosecution appears to me to have no application to the present controversy, relating, as it does, to a collateral offence which could be committed by a servant, notwithstanding that the article was in fact pure and unadulterated. *Coppen v. Moore* (1) is the principal authority of this class. The prosecution there was under sub-section 2 (not sub-section 1) of section 2 of the Merchandise Marks Act, which imposed an unqualified obligation on the seller from which he could not escape, save by proof that, acting in good faith, he had done everything possible to avoid the offence. *Mens rea* was no part of the offence, and the principal has to suffer for his servant's violation of duty. Such an offence bears no resemblance to a deliberate criminal act for which the offender is personally punishable, and for which, if the master was responsible, no effort on his part would enable him to avoid the brand of conviction. That an innocent principal should be punished for an offence under section 16 which he could not foresee or prevent, seems to me repugnant alike to common fairness and legal principle.

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The whirligig of time has brought in an amusing revenge. A wife, once free from criminal responsibility for certain acts of her own on the presumption of the husband's coercion, now finds herself, as her spouse's mistress, exposed to an attempt to punish her for his impulsive transgression, for which, on the evidence as it stands, she is free from blame, though in truth the contents of the broken bottle may not have been innocent of adulteration.

My brother Madden does not dissent from our conclusion, though he entertains doubt.

KENNY, J. :—

I concur. Having regard to the evidence given before the Justices, and their findings of fact, it is a matter of regret that we cannot support the conviction. However suspicious I may be as to the husband's conduct, I am not at liberty to presume guilt in the accused, unless, under the section of the statute, the act of the

(1) [1898] 2 Q. B. 306.

K. B. Div. manager can be imputed to the master. The section contemplates
1909. in express words a "wilful" obstruction, that is, an obstruction
TAYLOR, that is *intentional* on the part of the accused person. If the word
Appellant; "wilful" were not found in the section, the argument in favour of
NIXON, making the master, though not morally culpable, liable for an act
Respondent. done by the servant in the course of the latter's employment
Kenny, J. would be much stronger. The general rule even in such cases is,
that a man is not to be convicted of a crime if he has no *mens rea*;
and in order to make him responsible for the act of his servant,
it should be clear that the particular act is absolutely prohibited
by law.

In the present case I am of opinion that *mens rea* is an element in the offence, and that the accused person should not have been convicted unless she was shown to have, herself, committed the act, or unless it was established that she had made herself a party to it. I think that the findings in the case stated fall short of such proof, and that the Justices ought not to have convicted.

Solicitor for the appellant: *A. J. Lewis.*

Solicitor for the respondent: *T. M. Greer.*

J. L.

IN RE WORKMEN'S COMPENSATION ACT, 1906;
SHEERIN, APPLICANT; CLAYTON & CO., RESPONDENTS (1).

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Dec. 9.

*Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58)—Accident—Death
supervening upon sudden chill in course of employment.*

A workman employed in cleaning a millrace caught a sudden chill, caused by immersion in the water. Acute inflammation of the kidneys supervened, and he died within eight days. The medical evidence proved that the attack could only have been brought on, and death result, by the exposure to cold water, and in no other way:—

Held, that the case could not be distinguished from *Ismay, Imrie, & Co. v. Williamson* ([1908] A. C. 437), and that the death was caused by an accident within the meaning of the Workmen's Compensation Act, 1906.

APPEAL by the respondents from the order of His Honor Judge Curran, County Court Judge of Meath, dated 22nd June, 1909, awarding compensation under the Workmen's Compensation Act, 1906, to the dependants of James Sheerin. His widow was the applicant.

The deceased had been for many years in the employment of the respondents, and, for some days before he was seized with the fatal chill which led to his death, he was at work clearing a millrace belonging to them.

The learned County Court Judge reported as follows:—

Dr. W. P. Timmon, Navan, was the first witness sworn. He stated that on the 5th August, 1908, he was called to visit James Sheerin. He found him suffering from acute inflammation of the kidneys and uræmic poisoning. This would be caused from exposure by working in the water. I have had several cases of this kind. This was of the acute kind which often comes on twenty-four hours after the cause. In his opinion Sheerin's case came on suddenly, and it was caused by his immersion in the water. To Mr. O'Connor, K.C. (for respondents).—This disease

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CECILY.

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might be caused by exposure to any cold. Getting an ordinary cold might cause it. To me—But it must be such a cold as would give kidney-disease. Dr. Timmon—In this particular case I was aware that the man was in robust health up to the day before I saw him. The man had no ordinary cold, and from my diagnosis, and particularly as he also suffered from retention of urine, I was satisfied the attack could only have been brought on, and death result, by the exposure to cold water and in no other way. To Mr. O'Connor, K.C.—The normal time for neuritis to develop was from twenty-four to forty-eight hours.

Kate Sheerin was examined, and stated she was the applicant and widow of James Sheerin. She had eight children, three of them with herself dependent on her late husband—Francis, aged twenty; James, eighteen; and Ellen, fourteen. Was absent from home on a visit to a relative when her husband took ill. Saw him before his death on August 8th. Her husband worked a few perches from his home. He had been in respondents' employment for very many years; had always been a strong, healthy man, and very sober; earned 14s. per week; had a house from respondents at 1s. per week. He had been put by respondents to clean out the drain, and had done so on former occasions. When she returned home on the 5th August, her husband could hardly speak to her; he died on the 8th August. Death certificate produced. Cause of death, uræmia or acute nephritis. Her husband told her he got a chill from and while standing in the water working. This last evidence was objected to by Mr. O'Connor, K.C., for respondents. His death could not have been caused by anything else. Her husband was an inside hand in the mill, and the work he was put to in cleaning out the drain was different from his ordinary work. To Mr. O'Connor—She did not send in any claim till the 1st November; but she always intended doing so.

Mrs. Annie Collins, daughter of James Sheerin, was sworn, and stated that she saw her father on the 3rd August. He was then very ill, and complained of pains in his back and legs; said he had got a chill when working in the water on Friday; never knew him to work outside, always worked inside the mill; he remained cold and shivering till his death.

Francois Sheerin, son of the deceased, said his father had been working in the millrace for a fortnight with the water up to his knees. He left for work at 6 o'clock a.m. on the 1st August, in his usual health; he saw him working in the millrace that day. When he came home that evening, he complained of pains in his back, and went to bed about 4 o'clock that day. He told witness he was not able to stay in the water any longer.

No evidence was given on the part of respondents.

Mr. O'Connor, K.C., contended that the case did not come within the Act of 1906. Mr. Horan, *contra*. The following cases were referred to in the course of argument: *Morgan v. Owners of s.s. Zenaida* (1); *Broderick v. London County Council* (2); *Haylett v. Vigors and Others* (3).

Having duly considered the matter submitted to me, I do hereby make my award as follows:—I find as a matter of fact that the said James Sheerin of Navan, deceased, died on the 8th August, 1908, from an accident arising out of, and in the course of, his employment as a workman employed by the respondents, namely, from a sudden attack of uræmia and uræmic poison, caused by the sudden impact of the cold water in which he was working.

I refer to my full award for the amount awarded, and for names of dependants of the said James Sheerin, and the amount to be given to each of them.

JOHN ADYE CURRAN.

10th November, 1909.

James O'Connor, K.C., and T. Sullivan, for Clayton & Co. :—

This death was not caused by "accident" within the meaning of the Workmen's Compensation Act, 1906, and the authorities upon its construction. The word was much considered in *Fenton v. Thorley & Co., Limited* (4). There Lord Macnaghten says (at page 448): "I come to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word, as denoting an unlooked for mishap, or an untoward event, which is

(1) 25 T. L. R. 446.

(2) 99 L. T. (N. S.) 569.

(3) 99 L. T. (N. S.) 674.

(4) [1903] A. C. 443.

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not expected or designed." Lord Shand in his judgment used almost the same words, defining "accident" as "any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence." And Lord Lindley (p. 453) says, "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt, apart from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident."

Death by disease alone, though caused in the course of the employment of the deceased, does not entitle the dependant to compensation. It must have been caused by accident in the course of the employment: *Steel v. Cammell, Laird, & Co., Limited* (1). There a workman, in the course of his employment, contracted lead-poisoning which caused partial paralysis. He was held to be outside the Act, because the result came about gradually, not suddenly. Collins, M.R., points out that the Act deals with cases in which a date can be fixed as that on which the injury by accident occurred. The present case—catching cold—is put by Lord Robertson in *Brintons, Limited, v. Turvey* (2). He says, "Colloquially and accurately, we say that So and So accidentally caught cold or any other disease; and yet no one would think of saying that he had met with an accident." The applicant will rely on *Ismay, Imrie, & Co. v. Williamson* (3), an appeal from this Court. But there were several elements in that case which are absent from this. There was suddenness and unexpectedness. That disease contracted in the course of a workman's employment is not *per se* an accident within the Act, may be considered now as thoroughly settled: *Broderick v. London County Council* (4); *Morgan v. Owners of s.s. Zenaida* (5). This was clearly a death from disease, and the cause of it—the chill—was certainly not unexpected, though the death may have been so.

Section 8 of the Act of 1906, entitling dependants to compensation in cases of death from the diseases enumerated in the

(1) [1905] 2 K. B. 232.

(2) [1905] A. C. 230, at p. 236.

(3) [1908] A. C. 437.

(4) [1908] 2 K. B. 807.

(5) 25 T. L. R. 446.

3rd Schedule to the Act, impliedly excludes death from any other form of disease; and, as pointed out by Cozens-Hardy, M.R., in *Broderick v. London County Council* (1), shows that otherwise death resulting from disease would not come within the purview of the Act.

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Gerald Horan, for the applicant, Mrs. Sheerin, was not called on.

THE LORD CHANCELLOR:—

We are all of opinion that we are bound by the facts as found by the County Court Judge. In his report of the evidence he states that the doctor who visited the deceased man proved "that when he called to see him on the 5th August, 1908, he found him suffering from acute inflammation of the kidneys and uræmic poisoning. This would be caused from exposure by working in the water. I have had several cases of this kind. This was of the acute kind that comes on twenty-four hours after the cause. In his opinion Sheerin's case came on suddenly, and was caused by his immersion in the water. I was aware that the man was in robust health up to the day before I saw him. The man had no ordinary cold, and from my diagnosis, and particularly as he was also suffering from retention of urine, I was satisfied the attack could only have been brought on, and death result, by the exposure to cold water, and in no other way. The normal time for neuritis to develop is from twenty-four to forty-eight hours."

Kate Sheerin, the widow of deceased, stated that her husband had always been a strong, healthy man, and very sober. His death could not have been caused by anything but by the chill, from standing in the water working.

Annie Collins, his daughter, stated that she saw him on the 3rd August. He was then very ill, and complained of pains in his back and legs; said he had got a chill when working in the water. He remained cold and shivering till his death.

Francis Sheerin, son of the deceased, stated that his father left for work on the 1st August in his usual health. When he came

Appeal. home that evening, he complained of pains in his back, and went
1909. to bed about 4 o'clock that day. He told witness he was not able
to stay in the water any longer.

SHEERIN
v.
CLAYTON
& Co.

The Lord
Chancellor.

The County Court Judge found, as a matter of fact, that the said James Sheerin died on the 8th August from an accident, arising out of and in the course of his employment as a workman employed by the respondents, namely, from a sudden attack of uræmia and uræmic poison, caused by the sudden impact of the cold water in which he was working.

We cannot interfere with that finding, unless we came to the conclusion that there was no evidence to support it. That we cannot do. The word "accident" has, where used in this statute, long ceased to have the meaning the man in the street would attribute to it.

I think the case is governed by the decision in *Ismay's Case* (1) in the House of Lords. The appeal must be dismissed.

HOLMES, L.J. :—

I wish to make it clear that if the deceased, after working in the water, caught an ordinary cold or chill, which, from weakness of his constitution, he was unable to shake off, and ultimately led to his death, I should be unable to hold that compensation can be recovered. But the present case is not of this kind, and cannot in its facts be distinguished from the heat-stroke case. According to the evidence in that case, stokers and trimmers in the engine-rooms of steam vessels often suffer from heat-stroke, just as farm labourers often catch a chill. But the sufferer speedily recovers, and these temporary attacks could not be regarded as caused by an accident; but a heat-stroke of such a character as kills suddenly is unexpected, and therefore accidental. So, too, a chill, causing almost immediately severe kidney-disease, which carries off the patient in less than forty-eight hours, is equally unexpected—at least, I cannot distinguish between the two cases.

CHERRY, L.J. :—

The County Court Judge has found that the deceased died from an accident arising out of his employment, namely, from a

sudden attack of uræmia and uræmic poison, caused by his partial immersion in the cold water of the river in which he was working. The only question for us is whether there was evidence to support his finding.

I cannot see any distinction in principle between this case and *Ismay, Imrie, & Co., v. Williamson* (1), decided last year in the House of Lords. It seems to me that, though the death in this case was caused by a different disease, it was, in point of law, just as much accidental. The principle in each case is the same. Mr. O'Connor attempted to draw a distinction on the ground that the heat-stroke in the case I have referred to was sudden and unexpected, while, in the present case, he said neither element was present. I cannot agree with him in this. I think the illness which caused the death was sudden and unexpected here also. Speaking of Williamson's death, Lord Loreburn says (p. 439):—"In my view, this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death." This is all applicable to the present case, and I can see no reason for reversing the decision of the County Court Judge.

Solicitor for the applicant: *Tallon*.

Solicitor for the respondents: *Magee*.

W. G.

(1) [1908] A. C. 437.

Appeal.
1909.

SHEERIN
v.
CLAYTON
& Co.

Cherry, L.J.

K. B. Div.

1909.

MADDEN v. MAGUIRE (1).

Nov. 2, 3, 16.

(1909. No. 1607.)

Appeal. Landlord and tenant—Judicial sub-tenant acquiring middleman's interest—
 Dec. 16, 17, Land Law (Ireland) Act, 1881, sect. 15—Action to recover possession of
 20. land—Lease for lives renewable during lessor's lifetime and term of
 years, "to commence from the death of the last life in said indenture of
 lease."

A judicial sub-tenant, who acquires the estate of his immediate landlord, is not entitled, by section 15 of the Land Law (Ireland) Act, 1881, on the determination of that estate, to continue in possession of the land comprised in the sub-tenancy as tenant from year to year to the next superior landlord.

In an action of ejectment, brought on the determination of a lease, the defendant, who had purchased the lessee's interest some years previously, proved that, at the date of the purchase, he was in occupation of part of the premises demised by the lease as judicial sub-tenant of the then lessee, and that the assignment to him was made subject to his tenancy in part of said lands.

Judgment having been given for the plaintiff in the action for possession, on a motion by the defendant to vary the judgment:—

Held, by the King's Bench Division and by the Court of Appeal (*dissentiente* Cherry, L.J.), that the defendant was not entitled, under section 15 of the Land Law (Ireland) Act, 1881, to retain possession, as tenant from year to year to the plaintiff, of that part of the lands of which he had been in possession as sub-tenant at the date of the purchase of the lessee's interest in the lease.

By indenture of lease made in 1781, S. M. demised the lands of C. to C. C. (I), his heirs, executors, administrators, and assigns, for the lives of three persons named therein, and for the term of thirty-one years, from the death of the survivor of the said three lives; and, by a bond of even date therewith, S. M. bound himself in the penal sum of £500 that he would during his life, at the request of C. C. (I), his heirs or assigns, add or insert such lives or life as the said C. C. (I), his executors, administrators, or assigns, should nominate in the room of the lives named in the lease, in case they, or any of them, should die in the life of the said S. M., so as to keep up three lives in the said lease during the life of the said S. M.

(1) In the King's Bench Division, before ANDREWS, BOYD, and WRIGHT, JJ.

By indenture, made in 1802, between the said S. M. and C. C. (II), the successor in title of C. C. (I), after reciting the said bond, and reciting the death of two of the lives named in the lease of 1781, it was witnessed that the said S. M., in consideration of the said bond, and in part performance of the condition therein, granted the said lands to C. C. (II), his heirs, executors, administrators, and assigns, for the lives and life of the survivor of the lives named in the lease of 1781. and of two other persons, and the life of the survivor, and for the full term of thirty-one years, "to commence at the death of the last life in said indenture of lease."

C. C. (III), one of the lives added by the lease of 1802, survived the other lives named therein.

In an action of ejectment, brought by the successor in title of S. M.:—

Held, by the King's Bench Division and by the Court of Appeal, that the term of thirty-one years commenced to run on the death of C. C. (III), and not on the death of the survivor of the lives named in the lease of 1781.

A. B. Div.
1909.
MADDEN
v.
MAGUIRE.

NEW TRIAL MOTION.

The action, which was tried before Kenny, J., with a special jury in Trinity Sittings, 1909, was one of ejectment on the title brought on 6th February, 1909, by John C. W. Madden against Edward Maguire to recover possession of part of the townland of Cavanreagh, otherwise called Crowfoot, in the county of Monaghan, containing about 86 acres, which had been held under an indenture of lease dated 2nd December, 1802.

At the trial the defendant relied upon the following defences:—

(1) that, upon the true construction of the lease of 2nd December, 1802, the term thereby created determined long before the date when the action was commenced, and that a tenancy from year to year had then sprung up, which tenancy had not been duly determined; (2) that, even if the plaintiff was entitled to judgment, the defendant, having been in occupation as a sub-tenant at a judicial rent of 35 acres of the lands in question, was entitled, under section 15 of the Land Law (Ireland) Act, 1881, to retain possession of those 35 acres as tenant thereof to the plaintiff.

The contents of the documents put in evidence, so far as they are material for the purposes of this report, were as follows:—

By indenture of lease dated 21st July, 1781, made between Samuel Madden of the one part, and Charles Crowe (I) of the other part, it was witnessed that the said Samuel Madden thereby granted to the said Charles Crowe (I) all that part of

K. B. Div. the lands of Cavanreagh then in the possession of said Charles
1909. Crowe (I) and Francis Foster, and containing 50 Irish acres,
MADDEN to hold to the said Charles Crowe (I), his heirs, executors,
v. administrators, and assigns, from the first day of May then next
MAGUIRE. for the lives of John Crowe, Henry Crowe, and Charles Crowe (II),
first, fourth, and fifth sons of the said Charles Crowe (I), and the
lives and life of the survivors and survivor of them, and for the
term of thirty-one years to commence on the death of the survivor
of the said three lives.

This deed was lost and a memorial of it was put in evidence
at the trial.

By indenture, dated 2nd December, 1802, made between
Samuel Madden of the one part, and Charles Crowe (II) of
the other part, reciting the lease of 20th July, 1781; and
reciting that "by a certain bond or writing obligatory bearing
equal date with the said indenture of lease and duly executed by
the said Samuel Madden, he, the said Samuel Madden, did bind
himself and his executors, administrators, and assigns, jointly and
severally, unto the said Charles Crowe (I), the lessee in the said
indenture of lease named, his heirs or assigns, or his lawful
attorney, executors, administrators, or assigns, in the penal sum
of £500, conditioned that he, the said Samuel Madden, should
and would, at the request of the said Charles Crowe (I), his heirs
or assigns, during the life of him, the said Samuel Madden, add
or insert such lives or life as the said Charles Crowe (I), his execu-
tors, administrators, or assigns, should think proper to nominate
in the room and stead of the said John Crowe, Henry Crowe, and
Charles Crowe (II), or either or any of them, in case they or any
of them should happen to die in the lifetime of him, the said
Samuel Madden, so as to keep up three lives during the life of the
said Samuel Madden in the said lease . . . so as the three lives
might be up in being in the said demise during the life of the
said Samuel Madden; and reciting that Charles Crowe (I) was
since dead; and reciting that all the right, title, benefit, and
interest of renewal in said indenture of lease of and in said lands
of Crowfoot or Cavanreagh, and also of said bond and agreement,
had since become legally vested in Charles Crowe (II), party
thereto; and reciting that Henry Crowe and John Crowe,

were since dead; and reciting that Charles Crowe (II) had nominated Catherine Crowe and Charles Crowe (III) "as lives to be added to or inserted in said lease or article by said Samuel Madden, in place of and stead of said Henry Crowe and John Crowe in pursuance of his bond and agreement as aforesaid." It was by the said indenture witnessed that, "in consideration of said bond or writing obligatory, and in part performance of said agreement," and in consideration of 5s. paid by Charles Crowe (II) and the rent and covenants in "said indenture of lease reserved and expressed," he, the said Samuel Madden, did grant unto Charles Crowe (II), and to his heirs, executors, administrators, and assigns, all that the said lands of Cavanreagh, or Crowfoot, to hold to the said Charles Crowe (II), his heirs, executors, administrators, and assigns for the lives and life of the said Charles Crowe (II), Catherine Crowe, and Charles Crowe (III), and for the lives and life of the survivors and survivor of them, and for the full end and term of thirty-one years to commence at the death of the last life in the said indenture of lease.

K. B. Div.
1909.
MADDEN
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It was found by the jury that Charles Crowe (III), who died in 1877, survived Charles Crowe (II) and Catherine Crowe.

Prior to 1895, the lessee's interest in the said lease became vested in one Francis Fawcett, who had sublet portions of the lands demised thereby to three persons, viz., William Rowley, Margaret Gleeson, and Edward Maguire, the defendant, the portion so sublet to the latter being about 35 acres, in respect of which a judicial rent had been fixed as between the defendant and Francis Fawcett.

By indenture dated 30th September, 1895, Francis Fawcett assigned to the defendant, in consideration of £900, the premises demised by the said indenture of 2nd December, 1802, to hold to the said Edward Maguire, his executors, administrators, and assigns, "for all the life, lives, term of years, estate tenant-right, and interest created by the said lease," subject to the rent reserved thereby and the covenants contained therein, and "subject to the tenancies of Edward Maguire and William Rowley and Margaret Gleeson in parts of the said lands."

The plaintiff's title to the lessor's interest in the lease of the 2nd December, 1802, was admitted at the trial. It was proved that

K. B. Div. the posters advertising the sale of Fawcett's interest in the lands
 1909, contained a statement that the term of the lease of 2nd December,
MADDEN 1802, was thirty-one years from 1877. It was also proved that
v. in an action in 1897, brought by the plaintiff's predecessor in
MAGUIRE. title against the defendant to restrain the commission of waste, the
 defence did not deny the allegation in the statement of claim,
 that the term of thirty-one years commenced to run in 1877.

The Judge gave judgment for the plaintiff for possession of the lands mentioned in the writ and statement of claim with costs, subject to the tenancies of William Rowley and of the representatives of Margaret Gleeson, deceased.

The defendant moved for an order that the verdict and judgment should be set aside, and that judgment should be entered for the defendant with costs, or for a new trial; or, in the alternative, that the judgment, if any, entered for the plaintiff should be made subject to the outstanding yearly judicial tenancy of the defendant in 35 acres.

Fetherstonhaugh, K.C., and Healy, K.C. (with them Pringle),
 for the defendant.

Henry, K.C., and Calvert, for the plaintiff.

The arguments were similar to those addressed to the Court of Appeal: see page 124, *infra*.

Nov. 16.

ANDREWS, J.:—

This action was one of ejectment on the title brought on 6th February, 1909, to recover possession of part of the townland of Cavanreagh, otherwise called Crowfoot, in the county of Monaghan, containing about 86 acres, which had been held under a lease, dated 2nd December, 1802, which was a renewal of a lease dated 21st July, 1781; and according to the plaintiff's contention the lease of 1802 expired on 7th September, 1908. At the trial before Kenny, J., the jury found for the plaintiff for possession, and the Judge gave judgment for the plaintiff for possession, subject to the sub-tenancies of William Rowley and the representatives of Margaret Gleeson, deceased. The defendant, Edward Maguire,

has moved before us to have this verdict and judgment set aside. *K. B. Div.*
 The first question is, upon what date did the term created by the 1909.
 lease of 2nd December, 1802, expire? A further question, which I
 shall afterwards refer to more particularly, depends upon the con-
 struction of section 15 of the Land Law (Ir.) Act, 1881. In 1895
 the defendant acquired the lessee's interest in the lease of 1802 by
 purchase from one Francis Fawcett, in whom it was then vested.
 At that date the defendant was in possession of about 35 statute
 acres of the lands demised by the lease of 1802, as a sub-tenant;
 and a judicial rent had been fixed as between him and Fawcett.
 The defendant contends that, even if the plaintiff is entitled to
 judgment, he (the defendant) is entitled by section 15 of the Land
 Act of 1881 to retain possession of the 35 acres in question as
 tenant to the plaintiff.
MADDEN
v.
MAGUIRE.
Andrews, J.

I shall now consider the first of these questions. It is admitted that the lessor's interest in the lease of 1802 became vested in the plaintiff before action brought. This lease was made between Samuel Madden and one Charles Crowe, whom, to avoid confusion, I shall call Charles Crowe (II). It recites the earlier lease, dated 21st July, 1781, made by the said Samuel Madden to Charles Crowe (I), for the lives of John Crowe, Henry Crowe, and Charles Crowe (II), and the life of the survivor, and also for a term of thirty-one years "to commence on the death of the survivor of the said three lives." It appears that on the occasion when the lease of 1781 was executed the parties thereto entered into a contract in a somewhat unusual form for the renewal of this lease. Instead of inserting a covenant for renewal in the lease, the lessor executed a bond of even date which must be regarded as forming part of the terms of the lease. The only evidence which we have of the contents or effect of this bond is contained in a recital in the lease of 1802; and we must take it that the terms of the bond are correctly set forth in the recital. We cannot assume that the bond contained terms which are not in the recital; and I can see no reason for doubting the accuracy of the recital, which is as follows:—

"Whereas by a certain bond or writing obligatory bearing equal date with the said indenture of lease" (*i.e.* the lease of 1781), "and duly executed by the said Samuel Madden, he,

K. B. Div. the said Samuel Madden, did bind himself and his executors,
 1909. administrators, and assigns, jointly and severally, unto the said
 MADDEN Charles Crowe, the lessee in the said indenture of lease named,
 v. his heirs or assigns, or his lawful attorney, executors, adminis-
 MAGUIRE. trators, or assigns, in the penal sum of £500, conditioned that
 Andrews, J. he, the said Samuel Madden, should, and would, at the request of
 the said Charles Crowe, his heirs or assigns, during the natural
 life of him, the said Samuel Madden, *add or insert* such lives or
 life as the said Charles Crowe, his executors, administrators, or
 assigns, should think proper to nominate in the room and stead of
 the said John Crowe, Henry Crowe, and Charles Crowe, party
 hereto, or either or any of them, in case they, or any of them,
 should happen to die in the lifetime of him, the said Samuel Madden,
*so as to keep up three lives during the natural life of the said
 Samuel Madden in the said lease or article from the said Samuel
 Madden to the said Charles Crowe, without increase of rent or fine
 in lieu thereof, so as the three lives might be up in being in said
 demise during the life of the said Samuel Madden."*

Having regard to the words used in the bond as recited, viz. :
 "add or insert" such lives as the lessee should nominate, so as to
 "keep up three lives" in being during the life of the lessor, we
 are of opinion that, if we only had to construe the bond, the true
 effect of adding or inserting lives in the lease of 1781 in pursuance
 of the obligation imposed on the lessor by the bond, would not be
 to create a new and independent lease of the lands, but that each
 life so added or inserted would stand in the lease in lieu of the
 deceased life, and that the lease should be read with each "added"
 life "inserted" therein, and so that the term of thirty-one years
 would commence on the death of the survivor of such lives as
 had been added during the life of Samuel Madden, the lessor, in
 pursuance of the obligation created by the bond.

Now the lease of 1802 recites that, at the date when it was
 executed, two of the lives named in the lease of 1781 were dead,
 and that Charles Crowe (II), who had become entitled to the lessee's
 interest in the lease of 1781, had nominated two new lives, namely,
 Catherine Crowe and Charles Crowe (III). It has been found by
 the jury, and is not disputed, that Charles Crowe (III), who died
 in 1877, survived Catherine Crowe and Charles Crowe (II);

and therefore if the term of thirty-one years ran from the date of his death, there has, upon that assumption, been no such overholding by the defendant as would entitle him to be held to have become a tenant from year to year of the demised lands.

The defendant, however, contends that upon the true construction of the lease of 1802 the term of thirty-one years began to run on the death of the survivor of the three lives originally nominated in the lease of 1781, and that it ought to be assumed that the death of the survivor of those three lives must have occurred so long ago that there has been such an overholding as would entitle the defendant to be held to be a yearly tenant.

In support of this the defendant relies on the form of the habendum in the lease of 1802. By that lease Samuel Madden, "in consideration" (*inter alia*) "of the said bond" and "in part performance of the said agreement," demised the lands in question to Charles Crowe (II), "to have and to hold to the said Charles Crowe, his heirs, executors, administrators, and assigns, for the lives and life of the said Charles Crowe, Catherine Crowe, and Charles Crowe" (*i.e.* Charles Crowe (III)), "and for the lives and life of the survivors or survivor of them" (which must mean the survivor of the three persons just named), "and for the full end and term of thirty-one years to commence at the death of the last life in the said indenture of lease." The defendant's case is that, on the true construction of the habendum, the words "at the death of the last life in the said indenture of lease" mean at the death of the survivor of the three lives originally named in the lease of 1781, and that the lease referred to in the habendum is the lease as it existed in 1781. We are of opinion that the words which I have just quoted must be interpreted as meaning *the lease as it now stands*, that is, as having now inserted in it the new lives which are added by the lease of 1802, in accordance with the provisions of the bond as recited therein; and therefore we hold that the term of thirty-one years began to run on the death of the survivor of the three lives mentioned in the habendum of the lease of 1802, viz., on the death of Charles Crowe (III) in 1877.

Counsel for the defendant argued that the construction which we give to the lease of 1802 might in certain contingencies have given rise to an anomaly. The argument ran thus:—Assume that

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K. B. Div. the three lives originally nominated in the lease of 1781 had all
 1909. dropped in the lifetime of Samuel Madden, the original lessor;
 MADDEN and that the lessee, instead of requiring the lessor to add new
 v. lives, had allowed the term of thirty-one years to run for a number
 MAGUIRE. of years, or had even allowed it to expire in the lifetime of
 Andrews, J. Samuel Madden, then upon the construction which we put upon
 the lease of 1802, the lessee could, after the term of thirty-one years
 had run for so long a time or had expired, have called upon Samuel
 Madden to add new lives, and would have been entitled to hold
 the lands, not only during the currency of the lives so added, but
 also for a term of thirty-one years from the death of the survivor
 of the added lives. But this argument is based upon an assumption
 for which, in my opinion, there is no justification. The
 obligation to renew, as I construe the bond, was that three lives
 should be kept up continuously during the life of the original
 lessor, and it would not have been competent to the lessee to allow
 all the lives to drop, and then, long after the term had commenced
 to run, to insist upon the insertion or addition of new lives. I
 think that the lessor would not have been bound to renew under
 such circumstances; and could, if he chose, have refused to do so,
 his obligation being only to keep up three lives in being during
 his life. We know that when the renewal lease of 1802 was granted
 two of the lives originally named in the lease of 1781 had dropped,
 but we do not know the dates on which these persons died; and,
 in the absence of evidence as to that, I think we must assume
 either that the renewal lease was made as soon as was reasonably
 possible in accordance with the obligations contained in the
 bond, or that the lessor waived his right of objection for the
 time being.

We are therefore of opinion that the defendant cannot sustain
 his defence as to the whole of the lands in respect of which this
 action was brought; and I now turn to the second question in
 the case, which is, whether the defendant having been in occupa-
 tion as a sub-tenant of about 35 acres at the date when the lessee's
 interest in the lease of 1802 was acquired by him, is entitled,
 under section 15 of the Land Act of 1881, to retain these 35 acres
 as tenant thereof to the plaintiff.

It appears that Francis Fawcett, in whom the lessee's interest

in the lease of 1802 had become vested prior to 1895, had sublet portions of the lands thereby demised to three persons, namely, William Rowley, Margaret Gleeson, and the defendant. It is admitted that the two first-named persons were entitled to the benefit of section 15 of the Land Act of 1881.

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The assignment by Fawcett to the defendant was made on the 30th September, 1895. The deed of assignment is very badly drawn, and the title recited in it is not a correct recital of the title under which the lands were held, but it is conceded that, having regard to admitted facts, the effect of this assignment was to transfer to the defendant the lessee's interest in the lease of 1802. Now, of course, at law by that assignment, the defendant's interest as sub-tenant of 35 acres became merged in his acquired superior interest under the lease of 1802. It has, however, been argued on behalf of the defendant, that the strict law of merger cannot be applied here because it is subject, in equity, to the question whether the person to whose estate or interest the legal doctrine of merger would apply, intended to effect a merger, and, in the absence of evidence of intention, to the question whether it would have been to his interest to do so. The defendant's counsel contended that, in the present case, the fact that the assignment to the defendant was stated to be subject to his tenancy in part of the lands is evidence of his intention to keep up and preserve his interest as sub-tenant; but in my opinion, however that may be, such an argument does not assist us in determining the present case. Even if we assume that, according to the equitable doctrine, the defendant's sub-tenancy might be regarded as existing in equity for some purpose or purposes, that will not aid the defendant, because the enactment upon which he relies—section 15 of the Act of 1881—appears clearly to contemplate a case of an actual "holding" held by an existing tenant from an existing landlord under an existing contract of tenancy; and if that state of things does not in fact exist, the enactment has no application. I shall read the section, and then refer to two authorities on its interpretation. The section is as follows:—"If in the case of any holding the estate of the immediate landlord for the time being is determined during the continuance of any tenancy from year to year, whether subject or not subject to

K. B. Div. statutory conditions, the next superior landlord for the time being
 1909. shall, for the purposes of this Act, during the continuance of such
 MADDEN tenancy stand in the relation of immediate landlord to the tenant
 v. of the tenancy, and have the rights and be subject to the obliga-
 MAGUIRE. tions of an immediate landlord.”
 Andrews, J.

Now, it appears to us to be plain that this enactment contemplates the existence of a tenancy between a sub-tenant and a middleman, which, on the cesser of the middleman's estate, is to be converted into a tenancy to be held by the sub-tenant from the head-landlord. In order to better ascertain the meaning of section 15, we must turn to section 57 of the Act, which defines the terms “holding,” “tenant,” and “tenancy”; a “holding,” which, during the continuance of a tenancy, means a parcel of land held by a “tenant” from a “landlord”; a “tenancy,” which involves the existence of a tenant, *i.e.*, a person occupying land under a contract of tenancy from a “landlord,” a person who is thus defined:—“The immediate landlord or the person for the time being entitled to receive the rents and profits or take possession of the land held by his tenant.”

Now, in our opinion, that state of things ceased to exist as regards these 35 acres when the assignment of 1895 was executed, and it was brought to an end by the act of the defendant himself. He could not be his own landlord; he could not distrain upon himself, nor sue himself for rent, nor hold under himself. We need not consider whether the defendant could or could not have preserved his sub-tenancy by means of some conveyancing device, since he did not attempt to do so.

I now turn to the authorities upon the meaning and effect of section 15. The words “during the continuance of any tenancy” have been held to be incapable of a strict construction, because at law the sub-tenancy would expire at the same moment as the estate of the middleman; and, therefore, there could be no “continuance” of the sub-tenancy, and section 15 would be a nullity. It was accordingly held that, in order to bring a case within the section, it was only necessary to prove the existence of a tenancy between a middleman and a sub-tenant at the moment when the estate of the former expired. There are, however, two authorities which deal with the conditions essential to the existence

of such a tenancy. In *Seymour v. Quirke* (1), at p. 462 of the report, FitzGibbon, L.J., said:—"I concur with Morris, C.J., in regarding the provisions of the Land Act of 1881 affecting this case as enactments disturbing vested rights, and therefore, in my opinion, to be construed strictly. The benefits of the Act are to be extended to all whose cases come within its very words, but to none others."

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—
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That is an authority that, as section 15 was an alteration of the law, the person who claims the benefit of it must bring himself strictly within its terms: and in the later case of *West v. Huggard* (2), at p. 113, FitzGibbon, L.J., said:—"It may be as well to note the strict limits within which, so far as authority goes, this principle has been as yet recognized. In no case yet has the tenancy been held to continue, unless we have, first, an 'immediate landlord'; second, a 'next superior landlord'; and, third, a 'tenant of a tenancy'; who, either in reality, or under section 21, is a tenant from year to year of a holding within the Act. Unless these three characters co-exist, and unless the relation of landlord and tenant exists between each pair of them, at the determination of the mesne estate, we have not yet held that section 15 can apply."

Having regard to these pronouncements, and to the construction which we put upon section 15, we cannot hold that the defendant is entitled to the benefit of section 15. He annihilated his sub-tenancy in 1895 by taking an assignment which put an end to the existence of a separate landlord and a separate tenant of the 35 acres in question; and, once that tenancy ceased to exist, thenceforth there was nothing upon which section 15 could operate.

There is another matter to which I wish to refer. It was submitted in argument that the plaintiff's contention as to the construction of the leases of 1781 and 1802 (which we hold to be right) is fortified by two facts. First, that by the poster for the sale of the lessees' interest in 1895 the lands were stated to be held for the lives named in the lease of 1802, and for the term of thirty-one years from the death of the survivor of those lives, and

(1) 14 L. R. Ir. 455.

(2) [1894] 2 I. R. 108.

K. B. Div. that the defendant has enjoyed the full benefit of his purchase of 1909. that interest. Secondly, that in an action by the plaintiff's predecessor in title against the defendant for waste, both parties appear to have acted on the assumption that the term in question began to run on the death of Charles Crowe (III) in 1877. These considerations ought, in my opinion, to be, and they have been, disregarded by us. We must ascertain the meaning of the leases from the documents themselves; and if the parties had taken a wrong view of their rights or liabilities, we could not have allowed that to weigh with us in construing the leases.

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The judgment of Kenny, J., appears to us to be right, and the defendant's motion must, therefore, be refused with costs.

BOYD and WRIGHT, JJ., concurred.

J. C. W.

Appeal.

The defendant appealed (1).

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20.

Fetherstonhaugh, K.C., Healy, K.C., and Pringle, for the appellant :—

There are two defences, the first of which is a defence as to the whole action, and the second or alternative defence deals with the defendant's right to remain as sub-tenant of 18 acres. As to the first, the lease of 1802, after reciting the lease of 1781, limits the term to the three named lives, followed by a term of thirty-one years, to commence at the death of the last life "in the said indenture of lease." The last life in "the said indenture of lease," *i.e.* in the lease of 1781, admittedly dropped about 1850, consequently the lease expired about 1881, and since that date the defendant was tenant from year to year, and as such is entitled to notice to quit. Secondly, if judgment goes against the defendant, it should be made subject to his sub-tenancy in the 18 acres of which he was judicial sub-tenant prior to his purchase of the interest in 1895. The sub-tenancy did not merge in the

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

leasehold interest, although both were in the defendant. Merger or non-merger is a question of intention, and even in the absence of expressed intention the Court looks to the benefit of the person in whom the two estates become vested. The assignment of 1895 contains an expression of intention against merger as it was expressly subject to defendant's sub-tenancy: *Lewin on Trusts* (10th ed.), p. 889; *Ingle v. Vaughan Jenkins* (1); *Capital and Counties Bank v. Rhodes* (2). There is nothing contrary to the spirit of the Land Acts in holding that the sub-tenancy lay dormant and was capable of being revived: *Land Act, 1881*, sections 15-21; *Roe v. Cooney* (3); *Massey v. Norse* (4); *Seymour v. Quirke* (5); *West v. Huggard* (6).

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The term of thirty-one years ran from the fall of the last life in the lease of 1802. In the bond as recited Samuel Madden bound himself to add or insert new lives in the place of those that had lapsed, so that three lives might be in existence; the effect of which was to insert in the first lease the lives nominated by the second.

As regards the second point, the 15th section of the Act of 1881 clearly contemplates an actual existing sub-tenancy; the definitions of landlord and tenant, and holding, show that for the purposes of the Land Acts a man cannot be his own landlord; he could not sell to himself under the Land Purchase Acts, and get an advance of public money: *Dunraven's Estate* (7).

Fetherstonhaugh, K.C., in reply:—

An intention to merge or to prevent merger is ambulatory, and can be exercised at any time until the death of the person in whom both interests meet: *Lysaght v. Lysaght* (8); *In re Godley's Estate* (9). *Dunraven's Estate* (7) is distinguishable, and *Ellis's Estate* (10) shows that a tenancy purchased by the landlord and

(1) [1900] 2 Ch. 368.

(2) [1903] 1 Ch. 631.

(3) 14 L. R. Ir. 243.

(4) 20 L. R. Ir. 57.

(5) 14 L. R. Ir. 97, 455.

(6) [1894] 2 I. R. 108.

(7) 40 Ir. L. T. R. 159.

(8) 4 Ir. Jur. 110.

(9) [1896] 1 I. R. 45.

(10) 39 Ir. L. T. R. 227.

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vested in a trustee for him is only in suspense, and may be made operative for the purpose of the Land Acts by being again vested in a *bona fide* tenant.

THE LORD CHANCELLOR:—

The appeal in this action, which is one of ejectment on the title to recover the possession of certain lands called Crowfoot, in the county of Monaghan, raises two questions. The lands are held under a lease, dated 2nd December, 1802, the interest in which was purchased by the defendant from a man named Fawcett on the 30th September, 1895. A term of thirty-one years, commencing on the dropping of lives, or a life, was created by the lease for the benefit of the lessee, and the first question is at what date the term expired. The three names in the lease of 1802 are Charles Crowe, Catherine Crowe, and Charles Crowe, son of the other Charles Crowe, and who has been called Charles Crowe (III).

It has been found by the jury that Charles Crowe (III) died in 1877, and with that fact we have to construe the lease of 1802, but it is material for the construction of it also to consider the terms of a lease of 10th July, 1781, of which that of 1802 was a renewal, and also an agreement contained in a bond of even date with the lease of 1781, which was executed by the lessor.

The lease of 1781 was made by Samuel Madden to Charles Crowe, who is called Charles Crowe (I) of the lands comprised in the ejectment, to hold for the lives of John Crowe, Henry Crowe, and Charles Crowe, who is called Charles Crowe (II), all sons of the lessee, and the survivors and survivor of them, and the term of thirty-one years to commence on the death of the survivor of the three lives.

The rent reserved is 18s. per acre, which works out at £45 per annum for the 50 Irish acres demised. The agreement of Madden in the bond is that he would, at the request of Charles Crowe, during his (Madden's) life add and insert such lives or life as the said Charles Crowe, his executors, &c., should think proper to nominate in the room and stead of the three named lives, in case they or any of them should happen to die in the lifetime of Madden, so as to keep up three lives during Madden's life in the lease of

1781, without increase of rent or fine, and so as the three lives might be in being during Madden's life.

I think it quite clear that when a new life or lives were added or inserted pursuant to this agreement, and this might be done without a new lease by way of renewal being executed, all the terms of the lease of 1781 attached, including the term of thirty-one years and the date of its commencement.

The interest in the lease of 1781 devolved on Charles Crowe, one of the *cestui que vies*, and he survived John Crowe and Henry Crowe, and in pursuance of the agreement nominated Catherine Crowe and his own son Charles Crowe, whom we called Charles Crowe (III), as lives to be added and inserted. It was in fact carried out by a lease of 2nd December, 1802, made to Charles Crowe (II), reciting the nomination by him of the two lives pursuant to the bond, and the deed witnesses that Madden demised to Charles Crowe (II) the lands described as in his possession by virtue of the said original indenture of lease to have and to hold [His Lordship read the habendum], yielding and paying the said reserved yearly rent of £45 on the several respective days and times and in manner as in the said original lease is reserved. In the original lease it is payable during the lives and term commencing from the death of the survivor. I think we must read the lease of 1802 as with the new lives added and inserted under the agreement contained in the bond. Charles Crowe (II) was a living man, and known to be the last survivor of the lives in the lease of 1781, but he is not named as the person from whose death the term would commence to run. I think the words must be construed in the manner which would give effect to the agreement out of which the new nominations spring, and thus the last life should be read the last surviving life in this lease so supplemented, and this is in harmony with the words which follow, "subject to the several clauses and covenants in the said original lease," which of course is the lease of 1781.

I quite agree with Mr. Justice Andrews, that if the lives had all dropped and the term of thirty-one years were running, through the default of the lessee in not nominating, the landlord might have refused to add and insert said lives.

The second question is of quite a different character, and is

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one of general application. The defendant contends that the plaintiff, though otherwise entitled to succeed, can only obtain judgment subject to a judicial tenancy of the defendant in 18 acres (1) of the lands which were in his possession as such judicial tenant when he purchased in 1895. This contention is based on the assumption that the 15th section of the Act of 1881 applies to such a state of facts as exists here, and existed when the estate of Edward Maguire was determined by the ejectment of Madden. I assume that there must be presumed an intention on the part of Edward Maguire that the sub-tenancy in himself subsisting when he bought should not merge in the reversion which he acquired for himself and retained for twelve years.

The question which we have to determine is not I think whether merger did or did not take place, but whether the 15th section on its true construction applies to the facts. If it does not, as the interest of Edward Maguire as lessee to Madden fell, all interest under him fell also. What was the relation between the parties during the twelve years which followed the purchase in 1895? Edward Maguire was tenant to Madden of the 85 acres, but was he the immediate landlord of himself in the 18 acres? There was no rent paid. If there had not been a judicial tenancy, he could not have fixed a fair rent against himself. If he had assigned the interest in the 18 acres to a stranger, and such person had paid to Edward Maguire the original rent payable in respect of the 18 acres a different question would have arisen; but so far as regards the 18 acres I cannot see how there was a landlord and tenant subsisting which would attract the provisions of the 15th section by transferring a reversion in Edward Maguire to Madden.

As I read the 15th section there must be a tenancy from year to year subsisting and continuing under an immediate landlord whose place the superior landlord must take. The subject to be transferred did not, I think, exist within the section.

Seymour v. Quirke (2) is the case most strongly relied on by the defendant, and furnishes his strongest argument; but then on the settled construction of the 21st section of the Act of 1881,

(1) In the King's Bench the area was erroneously stated to be 35 acres.

(2) 14 L. R. Ir. 97, 455.

Murphy, on the termination of his lease in 1883, became tenant from year to year to Quirke, and, though this was only a deeming, it was a tenancy from year to year by construction; and when Quirke was wiped out, his yearly tenancy became, under section 15, attached to the reversion of the head landlord. It was not the less, according to the decision, continuing, because it arose at the dropping of the lease. In that case there were three named and existing separate persons, Seymour, Quirke and Murphy, between whom actual relations of landlord and tenant *inter se* existed.

The case of *West v. Huggard* (1) is I think an authority against the defendant. In that case Donovan, who in 1876, became tenant from year to year under West's predecessor in title, sublet to Huggard. West served notice to quit and determined Donovan's tenancy, and it was held that Huggard became tenant from year to year to West, and could fix a fair rent against him. FitzGibbon, L.J., in giving judgment says, at p. 113: "But the only difference between this case and *Seymour v. Quirke* (2) is this—the occupying tenant there was a lessee whose lease fell with that of the middleman, but who, under section 21, was to be deemed to be a tenant from year to year, while here the tenant was at the time of the determination of the middle interest actually and in fact a tenant from year to year. Therefore we can make no distinction between the two cases, unless we hold that an occupier who is 'deemed to be' a tenant from year to year is better off than one who actually is a tenant from year to year. I understood the decision in *Seymour v. Quirke* (2) to rest on the ground that section 21 gave the occupying lessee, at the simultaneous expiration of his lease with that of the middleman, the hypothetical *status* of a tenant from year to year, and that section 15 attached this supposed tenancy from year to year to the estate of the superior landlord instead of the mesne landlord, whose lease was at an end. If this be so, we cannot give the benefit of the section to a person who is only masquerading in the statutory character of a tenant from year to year, and refuse it to the real Simon Pure. It may be well to note the strict limits within which, so far as authority goes,

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(1) [1894] 2 I. R. 108.

(2) 14 L. R. Ir. 495.

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this principle has been as yet recognized. In no case yet has the tenancy been held to continue, unless we have first an 'immediate landlord'; second a 'next superior landlord' and third a 'tenant of the tenancy' who, either in reality or under section 21, is a tenant from year to year of a holding within the Act. Unless these three characters co-exist, and unless the relation of landlord and tenant exists between each pair of them at the determination of the mesne estate, we have not yet held that section 15 can apply."

The 15th section deals with "holding," "tenancy," and "tenant," and for the interpretation of these words, we must be guided by the definition of them in section 57. The facts negative the application of the definition to the alleged yearly tenancy of Edward Maguire under himself. The decision of Mr. Justice Meredith in *Dunraven's Estate* (1), proceeds I think on the same principle. He there held, that under the Land Purchase code, and for its application, there must be a real landlord, a real tenant, and a real tenancy, and that therefore when Lord Dunraven, the tenant for life, bought up the interest in a stud farm, which interest did not merge, he could not obtain an advance from the State, as he was buying from himself.

I think the decision of the King's Bench Division is right, and that the appeal must be dismissed.

HOLMES, L.J. :—

This is an action for the recovery of lands in county Monaghan brought by the owner of the reversion expectant on a lease dated the 2nd December, 1802, alleged to have determined in 1908. Edward Maguire purchased the lessee's interest in this lease in the year 1896, for £900; and during the year 1908 he was in possession of the demised lands containing 86 acres in all, except about 18 acres thereof, which were in the hands of two sub-tenants. It was admitted by the plaintiff that the 21st section of the Land Law (Ireland) Act, 1881, deprived him of the right to recover the premises thus sublet; but he claimed to be entitled to judgment for the remainder of the lands. The defence

relied on by Maguire to the whole of the lands in his possession, turns upon the construction of the lease of 1802. The casual reader of that document would assume that the term thereby created was for the lives and life of Charles Crowe, Catherine Griffith and a second Charles Crowe, and of the survivors and survivor of them, and for thirty-one years, to commence at the death of such survivor, who it is admitted died on the 7th September, 1877; and there is no doubt that the lease was so regarded by the owner of the reversion, by Francis Fawcett, in whom the lessee's interest was vested at the date of the sale to Maguire, and by Maguire himself. If this be the true construction, there is no doubt that the term came to an end in September, 1908, and that the plaintiff is entitled to judgment for the greater part of the lands then in Maguire's possession. The point relied on will be understood by reference to the document. It is a lease from Samuel Madden to Charles Crowe the younger. It recites a lease of the 10th July, 1781, by which the same Samuel Madden demised the same land at the same rent to Charles Crowe the elder. The term therein is for the lives of John Crowe, Henry Crowe, and Charles Crowe the younger, and for thirty-one years, to commence on the death of the survivor. It also recites a bond of concurrent date with the lease of 1781, by which Samuel Madden became bound to Charles Crowe the elder at his request, and that of his heirs and assigns during the life of him, Samuel Madden, to add or insert such life or lives as the lessee should think proper to nominate in the room of the three original lives, or any or either of them who should die, so as to keep up three lives during Samuel Madden's lifetime. It further recites the death of Charles Crowe the elder, and that the right of renewal thus given was vested in Charles Crowe the younger, who had nominated Catherine Crowe and Charles Crowe the youngest as lives to be added to or inserted in the said lease by Samuel Madden in the place of John Crowe and Henry Crowe deceased. After these recitals, Samuel Madden demised to Charles Crowe the younger the old lands at the old rent, to hold during the lives and life of Charles Crowe the younger, Catherine Griffith, and Charles Crowe the youngest, and of the survivors and survivor of them for thirty-one years to commence

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at the death of the last life in the said indenture of lease. Reliance is placed on the final words, which are interpreted as meaning the lease of 1781; and it is argued that as Charles Crowe the younger, the last survivor of the three lives named therein, died at least sixty years ago, the term of years began to run then and has long since expired, with the result that the only interest Fawcett had at the time of the sale to the defendant was a tenancy from year to year which has never been determined by notice to quit or otherwise. It is not necessary to question that the words, "the said indenture of lease," relied on by the defendant, refer to the lease of 1781; but they must also mean that lease with the two new lives added to and inserted therein; and the only reasonable construction is that the term of thirty-one years begins to run from the death of the survivor of the three. To construe them as the defendant asks, would be inconsistent with the contract in the bond and repugnant to the intention of the lease of 1802, taken as a whole.

This branch of the case gives me no difficulty, and if I am right, it puts an end to Maguire's defence for all the lands in his possession. Another question, however, has been raised in relation to a portion of them, containing about 18 statute acres, which before the sale had been let to Maguire by Fawcett at the annual rent of £17 15s.

It is argued that when the defendant purchased Fawcett's interest, it depended upon his intention whether this sub-tenancy was to merge in the reversion, or to remain outstanding; and that in the absence of a declared intention, it is to be assumed that his intention would be in accordance with his interest. This seems to me to be good law, and I only say that if I am at liberty to form an opinion, Maguire's own evidence at the trial is absolutely convincing that he had then intended that there should be a merger of the two interests. My reason is, that one of the issues raised by counsel for the defendant at the trial was that Maguire was entitled to hold as tenant from year to year under section 21 of the Act of 1881, notwithstanding the subletting, inasmuch as the parts sublet were less than one-eighth in value of the entire holding (see Land Law, Ireland, Act, 1896, section 7 (1b)). Maguire, giving evidence in support of this proposition, swore, "What I

have in my own hands is ten times the value of what is sublet." *Appeal.*
 One of the sub-tenants, William Rowley, produced by the defen- *1909.*
 dant, swore that £114 would be a fair rent for all this land, of *MADDEN*
 which £100 would represent what the defendant occupied. It is *v.*
 quite clear from this evidence that the defendant was making the *MAGUIRE.*
 case that his own sub-tenancy was gone—in other words, that it *Holmes, L.J.*
 had merged in the reversion.

The Judge decided against Mr. Fetherstonhaugh's proposition on the authority of a judgment of this Court, which held that it was for the Land Commission alone to estimate the value of the part of the holding sublet; but this does not affect the question of the defendant's intention. If a man elects in favour of merger to-day, he cannot elect otherwise to-morrow. It may be said that the question of election ought to have been left to the jury, and that I am not entitled to infer, even from the defendant's uncontradicted evidence, that there was a merger. There is, however, another ground not open to this objection which, in my opinion, entitles the plaintiff to the judgment given by Mr. Justice Kenny, and affirmed by the Divisional Court. I assume that there was no merger, and that at any time during the continuance of the lease the defendant might have disposed of the two interests in different ways, but in the absence of legislation to the contrary both interests would come to an end at the same moment on the termination of the term. To meet this difficulty the defendant relies on section 15 of the Act of 1881, which provides—"If in the case of any holding the estate of the immediate landlord for the time being is determined during the continuance of any tenancy from year to year, the next superior landlord for the time being shall, for the purposes of this Act, during the continuance of such tenancy stand in the relation of immediate landlord to the tenant of the tenancy, and have the rights and be subject to the obligations of an immediate landlord." The words "during the continuance of such tenancy" suggest a difficulty in construing this section in a case like this; but I shall assume that where the sub-tenancy exists up to the end of the term, the section implies that it will continue thereafter, if the other conditions of the section exist.

But as the section affects prejudicially the rights previously existing of the landlord, it ought to be construed strictly, and

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 1909. if its language is to have its natural meaning, it only relates to a
 MADDEN case where there is an intermediate landlord with a superior land-
 v. lord above him, and a tenant below him; but it is here sought to
 MAGUIRE. apply it to a case where there is only one landlord and one tenant.
 Holmes, L.J. It is, in fact, necessary to support the defendant's contention to
 make Maguire tenant to himself and landlord to himself. Like
 Mr. Justice Andrews, I regard this as an unreasonable construction.
 Therefore, I hold the appeal ought to be dismissed.

CHERRY, L.J. :—

Two questions were argued before us in this case. The first relates to the date of the determination of the lease of the 2nd December, 1802, under which the lands sought to be recovered in this action were formerly held; the second deals with the merger of a sub-tenancy, which the defendant alleges is binding upon the plaintiff under the 15th section of the Land Act, 1881. The first question concerns only the parties to this action, as it turns upon the construction of very peculiar documents; the second may have a very general application in relation to the rights of tenants under the Land Act.

The lease of 2nd December, 1802, from Samuel Madden to Charles Crowe (referred to in the arguments as Charles Crowe (I)) recites an earlier lease, between the same parties, of the same lands, for three lives therein named, "and for and during the term, time, and space of thirty-one years, to commence on the death of the survivor of said three lives." It also recites a bond bearing equal date with the earlier lease, by which the lessor bound himself under a penalty during his life to "add or insert" such lives as the lessee should nominate "in the room and stead" of the lives named in the earlier lease, in case they or any of them should happen to die in the lifetime of the lessor, "so as to keep up three lives during the natural life of" the lessor "*in said lease.*" It then recites that two of the three original lives had dropped, and that the lessee had nominated two others in their place, and the lessor then, "*in pursuance of his said bond and agreement,*" demises the lands to the lessee anew, to hold for three lives named, one being the survivor of the lives named in the earlier

lease, and the other two being those nominated by the lessee in substitution for those which had dropped, "and for the full end and term of thirty-one years to commence at the death of the last life in said indenture of lease, nevertheless subject to the several clauses and covenants in the said original lease."

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The question for our determination is:—Should the term of thirty-one years be held to run from the death of the survivor of the lives originally named in the earlier lease, or from that of the survivor of the original and substituted lives who might be nominated by the lessee in pursuance of his rights under the bond? Upon this question I concur in the judgment of Andrews, J., that the words which I have just quoted must be interpreted as meaning "the earlier lease as it now stands," *i.e.* as having now inserted in it the new lives which are added by the lease of 1802. I base my decision as he does upon the fact that the obligation imposed on the lessor by the bond was not to create a new and independent demise of the lands, but merely to "add or insert" new lives instead of those which had dropped, and that the lease should therefore be read as if the added lives had been there from the beginning. I think that this view is quite consistent with the exact words of the habendum, though at first sight it might appear not to be so. The words are not that the term is to commence from the death of the last life "*named in said indenture,*" but merely "*in said indenture,*" *i.e.*, I think, "either originally named in, or substituted for those named in" the lease. It may be asked why, if this were the intention, was not the term expressed to run merely from the death of the survivor of the lives named in the lease of 1802? The answer is that the lessor might have been called upon to add other lives in case any of the three named should die in his lifetime. The deed of 1802 was not necessarily the last occasion upon which the obligation imposed by the bond was to operate. That this was the view taken by the parties to the assignment of 30th September, 1895, is shown by the recital of the habendum of the lease in that deed. Though the date of the lease and the parties to it are misdescribed in that instrument, the habendum is paraphrased exactly in accordance with the view which the King's Bench Division has taken, and in which we concur. It is expressed to be for the

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lives, as set out in the lease of 1802, "and for any other life or lives to be inserted therein during the life of Samuel Madden and for thirty-one years to commence from the death *of the last life.*" This, of course, however, cannot affect our construction of the deed.

Even if we were to adopt the construction of the habendum pressed upon us by the defendant, I do not think it would help him very much. His contention is that the term began to run from the death of Charles Crowe (II), which occurred, according to the evidence, at least sixty years ago, so that the lease expired on the 7th September, 1877, or within a few years after that date, at latest. On this assumption he contends that the payment of rent for a long period of years has constituted him a tenant from year to year, and as no notice to quit has been served, the plaintiff cannot succeed in this action. It is true that in many cases a tenancy from year to year may be presumed to be created merely by the payment of rent, but I do not think that this would be so in the present case, where the payment was made and received on the assumption that the old lease was still subsisting. The decision of the Court of Queen's Bench, and in particular the judgment of O'Brien, J., in *Hurley v. Hanrahan* (1), seem to me to be conclusive authorities against the defendant on this point. *Quacunque via*, therefore the plaintiff is entitled to succeed, so far as the portion of the holding not sublet is concerned.

Prior to the assignment of 1895, very nearly half of the holding was sublet at rents the total amount of which was more than three-quarters of the rent reserved by the lease. As there was no evidence of consent to any of these sublettings, it was clear that the holding was then, at all events, excluded from the Land Acts, and that a fair rent could not be fixed as regards the entire. Each of the sub-tenants had, however, had a fair rent fixed, and had acquired a statutory term in his holding. Two of these tenancies are admitted still to exist and to have become binding upon the plaintiff by force of the 15th section of the Land Act, 1881. An important question arises as to the third, which was prior to 1875 vested in the defendant, namely, whether or not it became

(1) I. R. 1 C. L. 700.

merged in the leasehold interest, when that interest was assigned to him by the deed of the 30th September, 1895, and if not, whether it is now binding upon the plaintiff in the same way as the other tenancies are admitted to be. Upon that question I regret to say that I differ from the other members of the Court, and from the conclusion arrived at by the King's Bench Division. The doctrine of merger, it is well settled, applies to leases as well as to charges, and I see no reason why it should not apply to yearly tenancies, where they have acquired, as statutory tenancies in Ireland have undoubtedly acquired, the permanence of a lease for ever. The law on the subject is well stated by the present Master of the Rolls in England, then Cozens-Hardy, L.J., in *Capital & Counties Bank v. Rhodes* (1), as follows—"There was, prior to the Judicature Act, 1873, a great difference between the Courts of Law and the Courts of Equity on the subject of merger. The rule of the former was rigid, that whenever a term of years and a freehold estate, whether for life or in fee, immediately expectant upon the term, vested in the same person in his own right, the term was merged in the freehold, whatever may have been the intention of the parties to the transaction which resulted in the union. The Courts of Equity, on the other hand, in many cases, treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place," and he approves of, and adopts, the decision of Farwell, J., in *Ingle v. Vaughan Jenkins* (2), which was cited in the arguments before us.

Now it appears to me that there is evidence both of the intention and interest of the defendant in this case that merger should not take place. The evidence of intention is contained in the assignment to him of his then landlord's interest, which is made expressly subject to his own sub-tenancy. The interest to prevent merger is obvious, for if it has taken place, his tenancy, which may be a very reliable one, is extinguished for ever, and the head

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(1) [1903] 1 Ch. at p. 652.

(2) [1900] 2 Ch. 368.

Appeal. landlord acquires all the benefit of it without paying a penny for
1909. it. Andrews, J., did not directly decide this question as to merger,
MADDEN for in the view which he took of the case it was not necessary to
v. do so. "Even if we assume, for argument's sake," he says, "that
MAGUIRE. there is an equitable doctrine in accordance with which the estate
Cherry, L.J. created by the sub-tenancy might be regarded as kept up or
preserved for the benefit of any person other than the defend-
dant, that will not aid the defendant, because the enactment
upon which he relies—section 15 of the Act of 1881—appears
to contemplate a case of an actual holding, held by an
existing tenant from an existing landlord, under an existing
contract of tenancy, and if that state of things does not in
fact exist, the enactment has no application." A little later
he says:—"Now it appears to us to be plain that this enact-
ment contemplates the existence of a tenancy between a sub-
tenant and a middleman, which on the cesser of the middle-
man's estate is to be converted into a tenancy to be held by the
sub-tenant from the head landlord," and he goes on to analyze
the various sections of the Act of 1881, to show that such a
tenancy must be one actually existing in fact, not merely presumed
to exist. I cannot agree with this view. To me the decision of
this Court in *Seymour v. Quirke* (1) is a complete answer to any
such argument, for there the tenancy from year to year, by which
the head landlord was held to be bound, never existed, in fact, at
all. It was merely a hypothetical tenancy which at the very
moment of the expiration of the two leases (neither before nor
after) was "deemed" to exist under the 21st section of the Act,
and it never obtained actuality in any sense of the term, except as
against the head landlord. I can see no greater difficulty in
holding, in this case, the head landlord bound by a tenancy which
for many years was undoubtedly an actual tenancy in every sense
of the term, notwithstanding that it has been for some time, while
the two interests were vested in the one person, in suspense, than
in holding, as this Court did in *Seymour v. Quirke* (1), a head
landlord bound by a purely hypothetical tenancy which had never
existed in fact at any time.

Two cases were cited to us in opposition to this view, both decided by the present Master of the Rolls, then Meredith, J., *Ellis's Estate* (1) and *Dunraven's Estate* (2). I cannot see that they conflict with this view of the operation of sect. 15. All that they decide is that while the landlord's and tenant's interests are united in the same person, sales cannot be carried out under the Land Purchase Acts, or, in other words, that a man cannot sell to himself, and get a Government loan of the purchase-money; a fairly reasonable proposition, which, however, does not touch the question in this case. Indeed, the decision of one of them, *Ellis's Estate* (1), is distinctly an authority against the view put forward by the plaintiff here, for it was held that a judicial tenancy which was purchased by a landlord, and assigned to a trustee for him, still continued to exist, and that when assigned to another, who was a beneficial owner and not a trustee, a sale might be made to him under the Land Purchase Acts. The interposition of a trustee cannot I think make any difference, now that the doctrine of equity prevails in all Courts, and the case therefore very closely resembles the present one.

The whole policy of the Land Acts and of the numerous decisions upon them in this Court has been I think to secure that the occupying tenants of agricultural holdings in Ireland should acquire permanence for their tenancies, and that such tenancies should not, as far as possible, be held to be determined by any merely technical causes, which, apart from those Acts, might be held to have determined them, when the tenant remained throughout in occupation. The conclusion I have come to in this case seems to me in accordance with that policy, and I think that the order of the King's Bench Division should be varied by declaring that the judgment to be entered for the plaintiff in this action should be made subject to the outstanding yearly judicial tenancy of the defendant in 18A. 0R. 10P., part of the lands the subject-matter of this action.

Solicitor for the plaintiff: *M. E. Knight.*

Solicitor for the defendant: *W. A. Parke.*

R. ST. J. C.

(1) 39 Ir. L. T. R. 227.

(2) 40 Ir. L. T. R. 159.

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LEGITIMACY DECLARATION (IRELAND) ACT, 1868.
GEORGE GODWIN BARNHAM SWIFTE, PETITIONER;
THE ATTORNEY-GENERAL FOR IRELAND, RE-
SPONDENT; GODWIN BUTLER MEADE SWIFTE,
INTERVENIENT (1).

*Construction of statute—19 Geo. 2, c. 13 (Ir.), s. 1—Irish Penal Code—
Statute rendering void any marriage of a Protestant celebrated by a Roman
Catholic priest, whether extraterritorial in operation.*

Section 1 of 19 Geo. 2, c. 13 (Ir.), enacting that every marriage after the year 1746 celebrated between a Papist and any Protestant, or between two Protestants, if celebrated by a Popish priest, should be null and void, was not extraterritorial in its operation, and did not, while it was in force, affect a marriage celebrated in a foreign country.

In 1833, while this enactment was in force and unrepealed, a marriage was celebrated in Austria between A, a Protestant and domiciled Irishman, and B, who was a Roman Catholic, by a Roman Catholic priest *in facie ecclesiae*. This marriage was valid according to Austrian law, and at that time there was no other way in which a marriage could be validly contracted in Austria:—

Held, that this marriage was not avoided by sect. 1 of 19 Geo. 2, c. 13 (Ir.), and therefore that A could not, while B was alive, contract a valid marriage with another woman.

PETITION seeking to establish the legitimacy of the petitioner, who claimed to be the lawful son of Godwin Meade Pratt Swifte and Jane Anne Swifte, otherwise Hopkins. The Attorney-General did not appear, and Godwin Butler Meade Swifte, who was admittedly a lawful son of Godwin Meade Pratt Swifte, by his marriage with Mary Jane Clarke, intervened by leave of the Court and resisted the claim.

The same issue had been raised in an action in the Chancery Division in which the petitioner was plaintiff, and the intervenient was a defendant, which sought for the administration of

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

the personal estate of Godwin Meade Pratt Swifte. Mary Jane Swifte, who was also a defendant in that action, delivered a defence (a) denying that the plaintiff therein was the lawful son or one of the next-of-kin of Godwin Meade Pratt Swifte, and pleading the Statute of Limitations. The Master of the Rolls (Sir A. M. Porter) decided in favour of the defendant on both grounds, but the Court of Appeal and the House of Lords affirmed his decision on the application of the Statute of Limitations, without expressing any opinion as to the legitimacy of the plaintiff. The present proceedings were instituted for the purpose of having the judgment of the Master of the Rolls reviewed. The petition was tried before Wright, J., without a jury, who, in conformity with the judgment of the Master of the Rolls, found (1) that the marriage between Godwin Meade Pratt Swifte and Jane Anne Hopkins on the 18th March, 1845, was not a lawful and valid marriage, and (2) that the petitioner was not their lawful son. On motion to set aside these findings, the King's Bench Division, without delivering any formal judgment, but also in conformity with the decision of the Master of the Rolls, refused the motion with costs on the 23rd November, 1909.

The material facts of the case will be found fully stated in the judgment of the Lord Chancellor. They may be briefly outlined as follows :—

On the 3rd February, 1833, Godwin Meade Pratt Swifte, who was a Protestant, and a domiciled Irishman, was married to Maria Theresa Baroness von Wetzler, in the parish church of Kirchdorf, in the Empire of Austria, by a priest of the Roman Catholic Church, the Rev. Matthaus Kerschmauz, Vicar. This was a perfectly valid marriage according to Austrian law, and was the only way in which, at that time, a marriage in Austria could be lawfully contracted. Maria Theresa died on the 30th January, 1859. The Austrian marriage was never annulled. There was one son of that marriage, who died unmarried. On the 18th March, 1845, Godwin Meade Pratt Swifte went through a ceremony of marriage with Jane Anne Hopkins, at St. John's Church, Liverpool (which, except for his previous marriage, would have been undoubtedly valid). Of this union the petitioner was a child.

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Jane Anne Hopkins died on the 14th August, 1847.

In 1863 Godwin Meade Pratt Swifte married Mary Jane Clarke. The intervenient was the only son of that marriage, which was admittedly valid.

The question of the petitioner's legitimacy thus depended on the alleged invalidity of the Austrian marriage, which, he alleged, was rendered null and void by 19 Geo. 2, c. 13 (Ir.), section 1.

The portion of the judgment of the Master of the Rolls delivered on the 15th November, 1905, dealing with this question was as follows :—

“The question then first arises obviously on the marriage in Austria, with the Baroness von Wetzler. If that was a valid marriage, and if it was not severed by divorce or some other proceeding, then Godwin Pratt Swifte was not at liberty to contract a marriage in 1845, or at any time before the death of the Austrian lady. As I have said, the fact of that marriage is not denied, nor could it be. The certificate has been produced. Everything in the case shows that the parties were legally married. The certificate produced would be treated as conclusive evidence of the fact of marriage in an Austrian Court; and of the fact there is no doubt. It was celebrated not only in a way lawful in Austria, but in the *only way* in which if both had been Austrian subjects, or domiciled in Austria, it could have been there celebrated. There is no other way. It was celebrated by a parish priest, in the presence of witnesses, *in facie ecclesiae*; and that that was a valid marriage it is hardly worth while to pause to consider: but I take it on the evidence of the two Austrian lawyers who were examined here in Court on the subject. It is proved by the evidence of Dr. De Griez. He is asked (Question 1039), ‘According to Austrian law what effect has the production of that certificate (the certificate of marriage) in an Austrian Court?’ He says, ‘The Austrian Courts accept it as evidence of a marriage legally concluded.’ In answer to Question 1041, he says that the certificate contains everything that the law in Austria requires. He is asked (Question 1042), ‘Now, assuming the marriage referred to by that certificate to have taken place at the date mentioned, was there any machinery or provision in Austrian law by which the parties to the marriage could be

divorced?' He says the fundamental rule of our marriage law is based upon the canonical; and whether a marriage is between Catholic and Catholic or between Catholic and non-Catholic, the disability attaches to it at the present day that it cannot be dissolved.' (Question 1043), 'So even at the present day there is no machinery provided by Austrian law for the dissolution of a marriage between a Catholic and a non-Catholic?' 'Absolutely none.' And Dr. Krenn (the gentleman who gave his evidence through an interpreter) says to the same effect—Question 1079, 'Ask him if that certificate were produced in an Austrian Court, would it be accepted as evidence of a marriage?' 'Yes, it would be absolute evidence for the wedding that is evidenced by the certificate.' And again (1086), 'Ask him on what grounds can a marriage be annulled?' 'It is possible of course, but all the grounds must be before the marriage was concluded. Any incident that took place after the marriage was concluded would certainly be no reason.' And 1096:—'Is there any means by which a marriage between a Catholic and a Protestant validly celebrated in Austria can ever after the marriage be annulled?' 'No.'

"Thus to defeat the marriage some disability must be shown to have existed at and prior to its celebration. The disability relied on is that created by 19 Geo. 2, c. 13 (1745), which was in force in 1833.

"Section 1 of 19 Geo. 2, c. 13 (Ireland), recites:—'Whereas the laws now in being to prevent Popish priests from celebrating marriages between Protestant and Protestant or between Protestant and Papist, have hitherto been found ineffectual' (the previous statutes made, being hanging matter for the priest, but that was found to be ineffectual) 'for remedy whereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that every marriage that shall be celebrated after the first day of May, which shall be in the year of Our Lord God, 1746, between a Papist and any person who hath been, or hath professed him or herself to be, a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is

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hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever.'

"The words are very wide—'shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever,' and that is relied on by plaintiff's counsel as being a legislative enactment of the impossibility of any marriage being celebrated between a Protestant and a Catholic which should be valid under the Irish law if celebrated by what is called a Popish priest; and there can be no doubt that the parish priest who celebrated this marriage was a Roman Catholic. But, admittedly, some restriction must be imposed upon the latitude of the language of the section. There is no reference to locality. Every marriage so celebrated comes within its language. It would include a marriage celebrated between subjects of a foreign State over which we have no jurisdiction at all.

"There was manifestly no power in the Parliament of Ireland to avoid foreign marriages, made between persons domiciled abroad (say in Austria) and celebrated by persons, whether Popish priests or otherwise, not subject to Irish law. The section must receive a rational interpretation. No doubt if a priest domiciled abroad celebrated a marriage in Ireland between persons subject to Irish law, he would be within the enactment. Being here, he would be subject to our law. But that is not the present case.

"The Act is 'for remedy . . . of the insufficiency of the laws now in being to prevent Popish priests from celebrating marriages between Protestant and Papist,' *not* to prevent Protestants and Papists contracting legal marriages; for the parties to the marriage are the husband and wife; and the person before whom it takes place is not within the contract. *Such* marriages (*i.e.* mixed marriages) have always been legal, if lawfully celebrated. Even the cruelty—I might use a stronger term—of our own native Irish Parliament never dreamt of rendering them illegal *per se*. This Act is part of a code; but it is part of a code dealing with subjects of the King and with the celebration of marriages within the Kingdom of Ireland.

"Take the 12 Geo. 1, c. 3, the statute of 1725 (I need not go

further back). The first section makes the celebration of a marriage by a Popish priest between a Protestant and a Catholic penal and a felony, but it does not avoid them; and the second section provides that it should be lawful for any two Justices of the Peace in their respective counties by warrant to summon any person suspected to be married by a Popish priest, or to have been present at the celebration of such marriage, to appear before them at a place not more than ten miles distant from his or her usual place of abode; and it gives them power to examine these persons on oath; and if they refuse to appear, or to be examined, the Justices have power of convicting such offenders. It is absolutely impossible to apply this Act to the case of foreign marriages.

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"The 9 Geo. 2, c. 11, in section 1, deals with marriages where one of the parties is a person under age. Section 2 directs that, in order to avoid these marriages, when properly celebrated, a suit must be brought; and section 3 provides that if no suit is brought the marriage is to be absolutely good and valid. (There is nothing about the religion of the celebrant.)

"Then comes the Act of 19 Geo. 2, c. 13 (1745), to which I have referred. That was followed by 23 Geo. 2, c. 10 (1749), which deals with the case of persons absconding to avoid service of process; and it also recites that doubts had arisen as to the effect of 19 Geo. 2, which made the marriages celebrated by a Roman Catholic priest, where one or both of the parties were Protestants, null and void—whether owing to that Act the power still remained to punish the celebrating priest, to convict him of felony, and to pass a death sentence upon him; and it enacts that, notwithstanding anything in 19 Geo. 2, c. 13, all that power should remain.

"These statutes are all undoubtedly *in pari materia*, and they throw light on one another. I do not, however, draw the very same inference from them as is drawn by counsel for the plaintiff.

"From this code, therefore, it is to be deduced:—(1) That while mixed marriages were discouraged by the law, and rendered void without any judgment or process, if celebrated after 1st May, 1746, by a Popish priest, this does not in terms extend to the case of a marriage abroad; (2) That mixed marriages are nowhere declared by the law to be contrary to the law of God; (3) That

Appeal. there is not, and never was, any prohibition of such marriages, or
 1909. (4) any personal incapacity to contract them. On the contrary,
SWIFTE these are, and always have been, perfectly good and valid (if
v. unimpeachable upon other grounds unconnected with the mode of
SWIFTE. celebration), unless celebrated within territorial jurisdiction by a Roman Catholic clergyman.

“This being, in my opinion, the effect of the statutes, what is its bearing upon the marriage in Austria, celebrated in 1833?”

“The plaintiff’s counsel contend that the inability of two persons to contract a valid marriage, when celebrated by a Popish priest in Ireland, involves the application of the prohibition, as part of our municipal law, wherever such a marriage is held, and applies to countries where we have no jurisdiction, where there is no such prohibition; and where, as in this case, it is not only a lawful mode of celebrating marriage according to the *lex loci*, but where it is the *only* lawful mode. This means that in 1833 it was impossible that two people, one a domiciled Irish man or woman, could contract a lawful marriage in any part of Austria, and it may be in other countries as well, if one of the parties was a Protestant and the other a Roman Catholic. Now, it is proved that although there is such a thing as civil marriage in Austria at the present time, there was no civil marriage there in 1833. There was no mode of contracting marriage save *in facie ecclesiae*, that is, with the assistance of a Roman Catholic priest who existed there.

“The law, as I have always understood it, is that the competence or capacity of the parties to contract a marriage is regulated by the *lex domicilii*, and the mode in which it is carried out by the *lex loci contractus*. Professor Robertson, the very learned Professor of Civil Law in the University of London, says:—‘Any man or woman is capable of marrying, subject to certain disabilities, some of which are said to be canonical, as having been formerly under the cognizance of the Ecclesiastical Courts, others civil. The effect of the canonical disability as such was to make marriage not void but voidable. The marriage must be set aside by legal process, and sentence pronounced during the lifetime of the parties. Natural inability at the time of the marriage to procreate children is a canonical disability. So was proximity of relationship within the prohibited degrees, which has been made an absolute avoidance

of marriage by 5 & 6 Wm. 4, c. 54. A pre-engagement to another person was at one time recognized as a canonical disability. Civil disabilities are—(1) The fact that either party is already married and has a spouse still living; (2) the fact that either spouse is a person of unsound mind; (3) want of age, which for this purpose is fixed at the age of puberty as defined by the Roman law, *i.e.* fourteen for males and twelve for females; (4) proximity of relationship within the prohibited degrees.' That is, bigamy, polygamy, prohibited degrees (incest), insanity, physical incompetence.

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"If any of these is shown to exist, it would follow that there is no marriage, even if the ceremony be carried out with all the pomp and splendour of the most gorgeous foreign or domestic ritual. And of course *a positive statutory prohibition would be the same*. If our law provided that a Protestant and a Catholic should not be permitted to marry, and that a marriage between them should be null and void, then a ceremony performed by the Pope himself could not render it valid under the Italian or any other law. Of course this refers only to subjects of our legal jurisdiction and can have *per se* no application to persons not so subject.

"All the law on the subject is contained in the arguments and judgment in *Brook v. Brook* (1), in which case the decision was against a marriage celebrated in Denmark on grounds connected with the law of England, of which country both contracting parties were domiciled subjects. In that case Lord Campbell says:—'My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th June, 1850, in the Duchy of Holstein, in the Kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England—marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark.' He says:—'There can be no doubt of the general

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rule, that "a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere." But while the *forms* of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the *essentials* of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, *in essentials*, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.' He refers to the oft-quoted book of Mr. Justice Story, *On the Conflict of Laws*, and says: 'While he admits it to be the "rule that a marriage valid where celebrated is good everywhere," he says there are exceptions—those of marriage involving polygamy and incest, those *positively prohibited by the public law of a country from motives of policy*, and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the law of their own country. He adds: "In respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous.'" Again, at p. 213, referring to the argument of Sir Fitzroy Kelly, afterwards Lord Chief Baron, he says: 'He argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English Courts, as they are according to the law of the country in which the parties were domiciled when the marriages were

celebrated.' And again he says (p. 215), and this is the last passage I shall quote from his opinion: 'But I do lay very great stress on the consideration that Lord Hardwicke's Act *only regulated banns and licences*, and the *formalities* by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract, or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licences can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or licence in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the Legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. The appellant's counsel next produced a new authority, the very learned and lucid judgment of Dr. Radcliff in *Steele v. Braddell* (1). The Irish statute 9 Geo. 2, c. 11, enacts "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, and without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes, and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court to annul the marriage." A young gentleman, a native of Ireland, and domiciled there, went, while a minor, into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in Ireland, in which Dr. Radcliff presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage, in whatever country, without the consent of father or guardian. But the learned Judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it." And after

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(1) Milw. Eccl. Rep., Ir. 1.

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an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the Courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parents and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as "contrary to the Word of God," undoubtedly the marriage would have been dissolved. Dr. Radcliff expressly says, "It cannot be disputed that every State has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments, and not according to the laws of the country wherein it was formed." Another new case was brought forward, decided very recently by Sir Cresswell Cresswell: *Simonin v. Mallac* (1). This was a petition by Valerie Simonin, for a declaration of nullity of marriage. The petitioner alleged that a pretended ceremony of marriage was had between the petitioner and Leon Mallac of Paris, in the parish church of St. Martin's-in-the-Fields; that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage never was consummated: that the pretended marriage was in contradiction to and in evasion of the Code Napoléon; that the parties were natives of and domiciled in France; and that, subsequently to their return to France, the Civil Tribunal of the Department of the Seine had, at the suit of Leon Mallac, declared the said pretended marriage to be null and void. Leon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to London to avoid the French law, which required the consent of parents or guardians to their union, were married by licence in the parish church of St. Martin's-in-the-Fields. Sir Cresswell Cresswell, after

(1) 23 L. J., P. & M. 97.

the case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned Judge delivered as Assessor to Vice-Chancellor Stuart in *Brook v. Brook* (1)? Nothing whatever; for the objection to the validity of the marriage in England' (that is that the parties being minors there was no such consent as was required by French law) 'was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case therefore, comes into the same category as *Compton v. Bearcroft* (2) and *Steele v. Braddell* (3), decided by Dr. Radcliff. None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not by any forms or consents have been rendered valid in the country in which the parties were domiciled.'

"It is true that in no case of which I am aware does the question turn upon the construction of the Statute 19 Geo. 2, c. 13; but if it be that the case of disability created by that Act is *not a disability to contract, but only to contract in a particular way*, leaving the parties perfectly open to contract, but only forbidding them to employ the services of one particular kind of clergyman in Ireland on the occasion, that is one particular form of ceremony, then *Steele v. Braddell* (3) and *Simonin v. Mallac* (4) apply as well as *Scrimshire v. Scrimshire* (5) and *Swift v. Kelly* (6) and many other cases. The *status* of the parties in the country where they have their domicile is the substantial matter. The rest is form, governed by the *lex loci contractus*, and though the form in this case was not in accordance with the law in Ireland, the substance was unimpeachable. I am thus clearly of opinion that the marriage of the 3rd of February, 1833, of Godwin Pratt Swifte with the Baroness von Wetzler, was perfectly valid, and was subsisting on the 18th

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(1) 9 H. L. Cas. 193.

(2) Buller's N. P. 113, 114.

(3) Milw. Ecc. Rep., Ir. 1.

(4) 29 L. J., P. & M. 97.

(5) 2 Hagg. Cons. Rep. 395.

(6) 3 Knapp P. C. Cas. 257.

Appeal. March, 1845, when Mr. Swifte went through the ceremony of
 1909. marriage in Liverpool with Miss Hopkins."

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The petitioner appealed from the order of the King's Bench Division of 23rd November, 1909.

Samuels, K.C., and Darley, for the appellant.

Henry, K.C., and Swifte, for the respondent.

Dec. 20.

THE LORD CHANCELLOR :—

In this action, brought under the Legitimacy Declaration Act, the appeal is in form from the judgment of the King's Bench Division, but in reality it is an appeal from the decision of Sir A. M. Porter, made in the action of *Swifte v. Swifte*, on the 15th November, 1905, who dismissed the plaintiff's action on grounds which bind the plaintiff in the present action. As this was a decision of a Judge of co-ordinate jurisdiction with the King's Bench Division, that Court followed the decision of Sir Andrew Porter without expressing any independent opinion. But in this Court, on appeal, the decision of Sir Andrew Porter is open to review, and has been challenged.

The facts which raise the question may be stated in a few words :—

Godwin Meade Pratt Swifte, who was a Protestant, an Irishman, and British subject, on 3rd February, 1833, married in Austria the Baroness von Wetzler, an Austrian and a Catholic. This marriage was celebrated according to the law of Austria by a parish priest of the Roman Catholic Church, in the presence of witnesses *in facie ecclesiae*. The marriage was valid according to the law of Austria, and was evidenced by the production of a certificate of the marriage, which was the lawful mode of proof. This made dissolution by divorce impossible between those parties, but, at all events, no divorce was had, and the Baroness lived till the 30th January, 1859. This marriage was a lawful marriage according to the law of the country where it was celebrated, and, as I have said, it could not be dissolved, unless for some disability shown to exist at and prior to its celebration.

In March, 1845, during the life of the Baroness, Godwin Meade

Pratt Swifte, went through a ceremony of marriage with Jane Anne Hopkins in a Liverpool Parish Church. This was a due canonical marriage, and the plaintiff is a son of the marriage, born in wedlock on 11th January, 1847. There was an elder child of the marriage, born in wedlock, but he died in 1871. As the Baroness was living in 1845, it is obvious this marriage with Jane Anne Hopkins was unlawful, unless the marriage with the Baroness could be proved to be so. Jane Anne Hopkins died on the 14th August, 1847, and in February, 1863, Godwin Meade Pratt Swifte, both the Baroness and Jane Anne Hopkins being then dead, married Mary Jane Clarke, and of that marriage there is one son, Godwin Swifte.

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The plaintiff, however, contends that the marriage of 1833 with the Baroness was made null and void by the provisions of the Irish statute of 19 Geo. 2, c. 13, then in force; and this again raises the question whether this Act of 19 Geo. 2 was extraterritorial, and invalidated the marriage celebrated in Austria with an Austrian subject (valid according to Austrian law) because it was solemnized there by a priest, though solemnized in the only mode in which a marriage could lawfully be solemnized there.

First, as to the statute itself. It is intituled "An Act for annulling all marriages to be celebrated by any Popish priest between Protestant and Protestant, or between Protestant and Papist, and to amend and make more effectual an Act passed in this Kingdom in the sixth year of the reign of Her late Majesty Queen Anne, intituled an Act for the more effectual preventing the taking away and marrying children against the wills of their parents or guardians," and it then enacts—[His Lordship read the section given *ante*, p. 143, at full length]. And the Act, section 3, provides that the Act shall be read once in every year, from the 1st May, 1746, in all parish churches and all public chapels, and other places of public worship, by the parson, vicar, or curate of the respective parishes or chapels, immediately after morning prayer, and in open Court at every General Quarter Sessions of the Peace in this Kingdom—a provision obviously territorial in its character.

It is obvious, as pointed out by Sir Andrew Porter, that the Act cannot apply to two subjects of a foreign State; it must have

Appeal. some restrictions. It does not in terms apply to marriages
1909. abroad. Such a provision does appear in section 5 of the Act

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2 Anne, c. 6.

SWIFTE. This Act of 19 Geo. 2, c. 13, is amended by the Irish Act of
The Lord 23 Geo. 2, c. 10, which provided that the Popish priest celebrating
Chancellor. the marriage shall be guilty of felony, and suffer death, although
the marriage be declared null and void by the said recited Act—a
provision not extraterritorial.

It is to be observed that mixed marriages were always legal if
the ceremonies attending them were lawful.

The rule of law applicable is settled since, at all events, the
decision of *Brook v. Brook* (1), and *The Sussex Peerage Case* (2),
and I may add *Steele v. Braddell* (3), cited with approval in
Brook v. Brook (1).

The capacity of the parties to contract marriage is governed by
the law of the domicile, and the mode by the *lex loci contractus*.

If there is a personal disability attached by the law of domicile
to one of the contracting parties, it cannot be got rid of by marrying
in a foreign country. In *Brook v. Brook* (1) the marriage was by
the law deemed incestuous, and contrary to God's law; and,
therefore, though the marriage was celebrated in Denmark, it was
held unlawful. The Royal Marriage Act in like manner created
a personal incapacity.

In *Steele v. Braddell* (3) the provision annulling a marriage
was expressed in words just as strong as in 19 Geo. 2, c. 13, but
yet it was held, having regard to the whole Act there in question,
that the marriage was lawful.

It is said the code, of which the Act is one, puts the marriage
on the same footing as that in *Brook v. Brook* (1).

It is a most important consideration, in my judgment, that the
Act applies equally to marriages where both the contracting parties
are Protestants. No one can suggest that the code makes such a
marriage contrary to God's law so far as the contracting parties
are concerned. Upon the whole, I draw the same inference as the
Master of the Rolls did—"That while mixed marriages were
discouraged by the law and rendered void without any judgment

(1) 9 H. L. Cas. 193. (2) 11 Cl. & F. 143. (3) Milw. Ecc. Rep., Ir. 1.

or process, if celebrated after 1st May, 1746, by a Popish priest, this does not in terms extend to the case of a marriage abroad; (2) that mixed marriages are nowhere declared by the law to be contrary to the law of God; (3) that there is not and never was any prohibition of such marriages; or (4) any personal incapacity to contract them. On the contrary, these are, and always have been, good and valid (if unimpeachable upon other grounds unconnected with the mode of celebration), unless celebrated within territorial jurisdiction by a Roman Catholic clergyman."

The disability is to contract a marriage in the particular way and by the particular celebrant.

Upon the whole, I am of opinion that the decision of Sir Andrew Porter was in all respects right, and that the appeal should be dismissed with costs.

HOLMES, L.J.:—

The proceedings which have resulted in this appeal were begun by a petition in which George G. B. Swifte sought a declaration that he is the legitimate son of Godwin M. P. Swifte and a lady whose maiden name was Jane Anne Hopkins.

Godwin M. P. Swifte, an Irish Protestant gentleman of good means and position, was in Austria in 1833; and on the 3rd February in that year, the parish priest of an Austrian village performed the ceremony of marriage between him and the Baroness von Wetzler, a Roman Catholic, after which the two lived together for some time as husband and wife. They subsequently separated; and on the 18th March, 1845, the ceremony of marriage was performed in St. John's Church, Liverpool, between Mr. Swifte and Jane Anne Hopkins. They were the parents of the petitioner, who was born after the last-mentioned ceremony, and would be entitled to the declaration of legitimacy sought for if the Austrian ceremony did not constitute a legal marriage. The Attorney-General is named as respondent to the petition; but there was no appearance for him in Court, and the *legitimus contradictor* is an intervenient, named Godwin Butler Meade Swifte, who is admitted to be the son of the petitioner's father by a wife to whom he was married after both the Baroness and the

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Appeal. lady who succeeded her in his affections had died. The same
1909. question was raised between the same parties in an action in the
SWIFTE Rolls Court begun in the year 1904. That was a suit for the
v. administration of the personal estate of the father of the petitioner
SWIFTE. whose *locus standi* as plaintiff therein depended on his legitimacy.
Holmes, L.J. Sir Andrew Porter dismissed this action on the ground that at
the date of the marriage of his father and mother, the father was
the lawful husband of the Baroness who was then living. There
was an appeal by the plaintiff, first to this Court and afterwards
to the House of Lords; but while the result was to confirm the
judgment of dismissal, it was decided by both appellate tribunals
on a ground different from that of the Rolls; and neither
expressed an opinion on the question of legitimacy. Therefore,
although the Divisional Court, in the spirit of comity in which
Courts of co-ordinate jurisdiction act, confirmed the decision
already given, the plaintiff is not estopped thereby, and we must
exercise our independent judgment. At the same time, we cannot
overlook the elaborate discussion of the question, now in con-
troversy, by Sir Andrew Porter, and agreeing, as I do, with his
conclusion, I am to a great extent relieved from going over the
same ground.

The alleged invalidity of the Austrian marriage depended upon the Irish statute 19 Geo. 2, c. 13, which nullified every marriage to be celebrated after the 1st May, 1746, between a Papist and any person professing Protestantism at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest.

This is one of many statutes, appropriately called the Penal Code, enacted by the Irish Parliament during the eighteenth century, with the object of inducing Roman Catholics to become Protestants, by imposing on the former penalties and disabilities. The policy of this legislation was political, and, according to the views of its promoters, religious; but I am unable to attach to its policy the importance ascribed to it by the appellant's counsel. The true guide is to be found in the application of the ordinary rules of construction to what is enacted, and I propose to deal thus with the statute under consideration. Before it was passed, there were several enactments directed against the marriage of Protestants

with Roman Catholics. Protestants who contracted such marriages were dealt with very severely; but the legislation stopped short of forbidding an Irish subject to contract a marriage of this kind. If they chose to incur the penalties, a Protestant and Roman Catholic might legally marry. The statutes on this subject were especially directed against the priest who celebrated the marriage. For him, as declared in the Act of 1745, it was a hanging matter; and that Act seems to have been levelled more against him than against the parties, inasmuch as the marriages thereby declared void include marriages of Protestants celebrated by him—a kind of marriage which, if it were not for his interference, would appear from the political and religious point of view of the time, to be harmless, if not meritorious. Who are the priests here referred to? I have no doubt that they were either Irish subjects or foreign priests celebrating a marriage in Ireland. I cannot assume that the Irish Parliament, which had no authority to legislate for the subjects of a foreign State residing in that State, intended that its Acts should extend to foreign priests. It would be absurd to suppose that it contemplated that the heavy penalties imposed by the previous legislation, including felony without benefit of clergy, was to apply to a priest in France or Austria who had never set foot in Ireland.

For this reason alone, I would be prepared to construe the Act as applying only to a marriage celebrated by a priest in Ireland, or celebrated elsewhere, by a priest who was an Irish subject. Sir Andrew Porter put his decision, as I understood it, on somewhat different grounds; but on grounds which I think are sound, and in accordance with authority. There is an essential difference between a statute which declares a subject of the realm incapable of contracting a marriage of a specified kind, and a statute which prescribes the mode in which a lawful marriage is to be celebrated. In the one case the Act is extra-territorial, and applies wherever, and by whatsoever form, the marriage takes place; in the other the mode in which the marriage is carried out is regulated by the *lex loci*. I agree with Sir Andrew Porter in his reasoning and illustrations in dealing with these propositions, which it is unnecessary for me to repeat or expand, and I acquit the Irish Parliament of prohibiting by its

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Act of 1745, Irish subjects, Protestant or Roman Catholic, from being married in countries like Austria in the only mode in which, according to the evidence of the Austrian lawyers, marriages could be celebrated in that year or for generations later.

CHERRY, L.J. :—

I concur. The question of the legitimacy of the petitioner depends upon the validity of the ceremony of marriage between his parents, which was performed on the 18th of March, 1845, and that again, upon the alleged invalidity of a prior marriage in 1833, of his father to the Baroness von Wetzler—for it is not disputed that the Baroness was living at the time of the marriage of 1845, and that she had not in any way been legally divorced from her husband, the petitioner's father.

The marriage of petitioner's father to the Baroness von Wetzler took place in Austria, and was celebrated by a Roman Catholic priest, that being the only legal manner in which, if both had been Austrian subjects, it could have been there celebrated at that time. It is contended, however, by the petitioner's counsel that, as one of the parties to the marriage was a British subject domiciled in Ireland, the marriage was rendered void by force of the Irish statute 19 Geo. 2, c. 13, for one of the parties was a Protestant, and the other a Roman Catholic.

The whole case turns therefore on the question of law, whether that Act, which remained unrepealed until 1870, applied to a marriage celebrated in a foreign country as well as to marriages celebrated in Ireland; for there is no doubt that this marriage, celebrated in the manner in which it was, would have been invalid had it been celebrated in Ireland.

The argument of Mr. Samuels for the petitioner was mainly based upon the general policy of the whole penal code, which was passed by the Irish Parliament at the end of the seventeenth and beginning of the eighteenth century. He referred us to many of these statutes, and contended that the general effect of them was to show that the code was inspired by religious and political motives to such a degree as to indicate that the statutes were intended to be extra-territorial in their operation, to the extent at all events of binding Irish subjects when resident abroad. He

also urged that one of the main objects of the code was to prevent mixed marriages between Protestants and Roman Catholics, which were deemed, he said, according to the spirit of the time, to be contrary to the law of God, and that such difference of religion would constitute an absolute incapacity to contract marriage similar to that of near-relationship, thus bringing the case within the principles laid down in the leading case of *Brook v. Brook* (1). He contended accordingly that a marriage between such persons, celebrated by a Roman Catholic priest, should be deemed invalid in Ireland, no matter where it took place.

Before dealing with the general effect of the entire code, it will be well to consider the exact terms of the statute itself which, it is alleged, makes this marriage invalid—19 Geo. 2, c. 13. The first fact which strikes us is, that it is not confined to mixed marriages at all, but applies equally to marriages between two Protestants if celebrated by “Popish priests,” as they are called. All the argument therefore in favour of the extra-territorial effect of this statute, based upon the policy of the law to prevent mixed marriages as being contrary to the law of God, at once falls to the ground; for no distinction can possibly be drawn between the effect of the Act as regards the two kinds of marriages. The question in this case would be exactly the same as it is, if the Baroness von Wetzler had been, as her husband was, a Protestant; indeed the case against the validity of the marriage would I think have been much stronger had she been an Irish Protestant, instead of an Austrian Roman Catholic. What policy of the law can there be to prevent two Protestants from intermarrying according to the law of the country in which they are at the time living?

Again, it appears to me, on the plain reading of the statute itself, that its main object was not, as the petitioner here contends, to prevent mixed marriages, but to prevent Roman Catholic priests from celebrating the marriages of any persons other than members of their own Church.

The recital to the Act shows that intention plainly. “Whereas,” it runs, “the laws now in being to prevent Popish priests from

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(1) 9 H. L. Cas. 193.

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celebrating marriages between Protestant and Protestant or between Protestant and Papist, have hitherto been found ineffectual, *for remedy whereof*, be it enacted," &c.; and then it goes on to declare such marriages null and void. How can it be contended that this statute was extra-territorial in its operation, unless the other Acts which had "hitherto been found ineffectual" were also so? The principal of these was the 12 Geo. 1, c. 3, "An Act to prevent marriages by degraded clergymen and Popish priests," passed in the year 1725. The scope of this Act as regards marriages was exactly the same as that of the Act with which we are now dealing. It applied to any marriage between two Protestants or between a Protestant and a Papist, and provided that any "Popish priest" or degraded clergyman celebrating such a marriage should be guilty of felony, and suffer death as a felon. Could it for a moment be contended that this Act applied to priests celebrating marriages in France, or Italy, or Austria? Indeed, Mr. Samuels expressly admitted that it did not, and, if not, how can the Act which was passed, as it itself recites, to make this Act more effectual, be given such an operation?

I am, therefore, clearly of opinion that the judgment of the late Master of the Rolls, Sir Andrew Porter, was right, and that this Act, 19 Geo. 2, c. 13, applied only to marriages celebrated in Ireland, and not to foreign marriages, no matter who the parties to them were. This view coincides with that apparently taken by the Court in *Thelwall v. Yelverton* (1), though the question did not directly arise in that case. The third exception taken by the defendant there was as follows;—"That to constitute a ceremony of marriage *celebrated in Ireland* by a Roman Catholic priest a valid marriage, it was necessary that both parties for twelve months previously to such ceremony should have uniformly, uninterruptedly, and publicly professed the Roman Catholic religion." "I am of opinion," says Christian, J. (at pp. 202, 233), "that that proposition is correct."

This view of the effect of this statute accords also with the general rule of law as laid down in *Brook v. Brook* (2), that

(1) 14 Ir. C. L. R. 188.

(2) 9 H. L. Cas. 193.

although the essentials of the contract of marriage, *e.g.*, the capacity to contract, depend upon the *lex domicilii*, the forms of entering into the contract are to be regulated by the *lex loci contractus*, a convenient rule from which it would not be wise (even if it were permissible) to depart, unless we were constrained by the actual words of a statute to do so.

Having come to a clear conclusion upon the words of the statute itself which we are construing, it is not necessary to consider, at any length, the argument based upon the general effect of the Penal Code. I may say, however, that I cannot see anything in the code in any way pointing to a different conclusion. Many of the statutes to which we were referred clearly cannot apply extra-territorially. It is admitted that the 12 Geo. 1, c. 3, which makes the celebration of a mixed marriage by a priest felony, does not do so. In *Steele v. Braddell* (1) Dr. Radcliff, referring to 9 Geo. 2, c. 11, says that there is no mention of marriages out of Ireland in that Act, nor anything to show that such marriages were contemplated by it. Some of the Acts, *e.g.*, 2 Anne, c. 6, in terms apply to marriages "either within this kingdom or outside thereof," but such Acts instead of assisting the petitioner's contention seem to me to indicate that other Acts unless they contain similar words do not apply in the same way. Whether we regard, therefore, the exact wording of the statute we are construing, the policy indicated by other Acts of the code, or the general rule of law as to marriages laid down by Lord Campbell in *Brook v. Brook* (2), we come to the same conclusion, that this Austrian marriage was not affected by the 19 Geo. 2, c. 13, and was good and valid, and that consequently the marriage of the petitioner's parents was illegal and void.

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Solicitors for the appellant : *A. & L. Goodbody.*

Solicitors for the respondent : *H. T. Dix & Sons.*

W. G.

(1) *Milw. Eccl. Rep.*, Ir. 1.

(2) 9 H. L. Cas. 193.

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1910.

SINTON AND ANOTHER v. DOOLEY (1).

Jan. 12. *Mortgage—Mortgagee's right to sue on personal covenant—Petition for sale by another mortgagee pending—Landed Estates Court Act, 1858 (21 & 22 Vict. c. 72), s. 69.*
Appeal.
Feb. 1.

A mortgagee's right of action against his mortgagor upon the personal covenant of the latter for payment of the mortgage debt is not suspended while a petition for the sale of the mortgaged lands brought by another mortgagee is pending in the Land Judge's Court.

MOTION FOR FINAL JUDGMENT.

The action was brought by W. M. Sinton and D. A. Sinton, to recover a sum of £263£ 18s. 5d. due to them by the defendant, T. H. Dooley, under a covenant in a mortgage deed of 14th September, 1895, made between the defendant and the plaintiffs. Of the sum claimed, £215£ 14s. 7d. represented the balance of a principal sum of £3000 secured by the said mortgage, and the residue of the claim was for interest. The writ gave full particulars of the payments made by the defendant for which credit was given; and also of the items composing the claim for interest. The writ was issued on 26th August, 1909.

On 13th April, 1909, an absolute order for the sale of all the lands, the subject of the mortgage deed of 14th September, 1895, had been made by the Land Judge (Ross, J.), upon a petition for sale in the matter of the estate of T. H. Dooley (the defendant), and others, owners, *ex parte* H. F. Stephens, petitioner. H. F. Stephens was an incumbrancer on the said lands; but was *puisne* to the plaintiffs, who were first mortgagees under the deed of 14th September, 1895. The plaintiffs had entered an appearance in the proceedings before the Land Judge; and the debt due to them under the said mortgage deed had been placed upon the schedule of incumbrances.

It was sworn by the defendant that the absolute order for sale

(1) In the King's Bench Division before GIBSON and BORD, JJ.

was still in force; that part of the estate had been sold; and that on 13th December, 1909, there was, as shown by the certificate of the Accountant-General, a sum of £2,566 standing to the credit of the said estate.

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1910.
SINTON
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DOOLEY.

John Donaldson, for the plaintiff:—

The debt is not denied by the defendant. The plaintiffs are entitled to sue upon the covenant for payment in the mortgage deed, notwithstanding the fact that a petition for the sale of the mortgaged lands is now pending in the Land Judge's Court: Landed Estates Court Act, 1858, s. 69.

H. Geoghegan, for the defendant:—

The defendant is unable to say whether the sums for which credit is allowed in the writ are or are not accurate; and he desires to have an account taken. In such a case liberty to sign final judgment ought not to be given: *Jacobs v. Booth's Distillery Company* (1), *Wallingford v. Mutual Society* (2); see especially the judgment of Lord Selborne, C., at pages 693–695 of the report of the latter case.

Apart, however, from this question, the plaintiffs are not now in a position to reconvey the mortgaged lands, and have therefore no right to maintain the action: *Schoole v. Sall* (3); *Kinnaird v. Trollope* (4); *Fisher on Mortgages* (5th ed.), pp. 353, 470–472.

The object of section 69 of the Landed Estates Court Act, 1858, is to keep alive the rights of both mortgagor and mortgagee, after the termination of proceedings which have been brought under the Act; but I submit that, while such proceedings are pending, all other rights of a mortgagee are suspended.

Donaldson, in reply:—

The cases cited on behalf of the defendant are cases in which, either by foreclosure and sale, or by pledging the title-deeds of the mortgaged property, the mortgagee had, by his own act, put it out of his power to re-convey the mortgaged lands. In the

(1) 85 L. T. (N. S.) 262.

(2) 5 A. C. 685.

(3) 1 Sch. & Lefroy, 176.

(4) 39 Ch. D. 636.

K. B. Div. present case the plaintiffs' power to reconvey the lands has been
 1910. divested by *vis major*; but they can reconvey the mortgage debt.
SINTON The mortgage deed is in their possession, and the title-deeds are
v.
DOOLEY. in the custody of the Land Judge.

GIBSON, J. :—

Two arguments have been advanced as a defence to this motion. The first is that the defendant is entitled to have an account taken of the amount now due upon foot of the mortgage debt, and that judgment ought not to be given against him until that has been done. There is, however, no evidence to show that the claim is excessive, or that the defendant has not been given credit for all payments made by him.

The second contention of the defendant is that the plaintiffs cannot sue upon the personal covenant for payment while a petition for the sale of the mortgaged property is pending in the Land Judge's Court. The law with regard to the rights of mortgagor and mortgagee in England differs in some respects from that which prevails in this country. With us, the mortgagee's remedy is sale, not foreclosure. If a mortgagee forecloses, and puts it out of his power to restore the mortgaged property, he is, no doubt, debarred by his conduct from suing the mortgagor on his personal covenant. It may seem unreasonable that, in a case where the value of the mortgaged property is less than the mortgage debt, the mortgagor should after foreclosure forfeit his other remedy for recovering the balance of the debt; but the law upon that point in England is quite settled. In Ireland, where the mortgagee must enforce his security by sale, the same rule (apart from section 69 of the Landed Estates Court Act) might apply, as by his voluntary action *in invitum* he would make reconveyance to the mortgagor impossible. A sale under power in the security may be subject to different considerations. No authority, however, has been cited laying down that the mortgagee's right of action is extinguished or suspended by an order for sale obtained at the instance of another incumbrancer. In my opinion, section 69 of the Landed Estates Court Act improves the position of a petitioning mortgagee, who but for it might find it difficult to enforce any right or remedy, but it cannot in point of law amount to a postponement

of an outside incumbrancer until the sale has been completed and the proceeds allocated. The section applies to all kinds of incumbrancers, and is not restricted to mortgagees. To suspend, without extinguishing, an action of covenant, would be a legal anomaly which it would require the clearest language to create. In the present case the petition for sale has not been instituted by the plaintiffs; and, therefore, I think that they are not debarred from recovering judgment upon the defendant's personal covenant to repay the mortgage debt. If the plaintiffs had assigned their mortgage, or had deposited their title-deeds by way of equitable mortgage, so as to take away their power to reconvey, they could not then sustain the present motion; but in the present case the deeds are at home. The mortgage deed is in the plaintiffs' possession, and the title-deeds relating to the mortgaged lands are in the custody of the Land Judge. There appears to be no reason why the plaintiffs should not be allowed to enforce their rights against the defendant. If and when they are paid their debt in full, they must reconvey to the defendant.

Boyd, J., concurred.

J. C. W.

The defendant appealed (1).

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Feb. 1.

H. Geoghegan, for the appellant.

John Donaldson, for the respondents, was not called on.

THE COURT OF APPEAL affirmed the decision of the King's Bench Division.

Solicitors for the plaintiff: *Carleton, Atkinson, & Sloan*.

Solicitors for the defendant: *A. & L. Goodbody*.

R. ST. J. C.

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

K. B. Div. **KEOGH v. THE INCORPORATED DENTAL HOSPITAL**
1909.
OF IRELAND (1).

June 11, 29.

Appeal.

Oct. 27, 28.

Libel—Practice—Particulars—Judicature Act, 1877, s. 61—R. S. C., I.
(Feb. 22, 1905), *Order XIX., Rule 7.*

In an action of libel the defendant is not entitled to particulars of the name or names of the person or persons to whom, the date or dates on which, and the place or places where, the alleged libel was published, in the absence of special grounds requiring them, and especially in a case where the particulars of publication (if any) must be known to the defendant.

Semble : There is no established practice in England for ordering such particulars in actions for libel without special grounds, which would, under section 61 of the Judicature Act, 1877, coerce the Courts in this country to depart from their hitherto well-settled practice.

MOTION by the defendants, in an action for libel, for particulars of the publication relied on by the plaintiff.

The action was brought by Myles Keogh against the Incorporated Dental Hospital of Dublin; and the alleged libel was pleaded in the statement of claim as follows:—"The defendants falsely and maliciously wrote and published of the plaintiff the words:—'Resolved—That Mr. Keogh (meaning the plaintiff) cannot be accepted as a student of this hospital (meaning the dental hospital of the defendant company), the committee having the right by their bye-laws to refuse any student without assigning a cause.'"

The said resolution had been passed and entered on the minute book of the defendant company on the 18th May, 1908, on which date an application by the plaintiff to be admitted as a student of the said hospital came before the committee of management of the defendant company, and a copy of the said resolution was subsequently, at the request of the plaintiff, sent to him by the Registrar of the defendant company in the course of a correspondence between them relating to the plaintiff's said application.

(1) In the King's Bench Division, before MADDEN and BOYD, JJ.

As the committee of management adhered to the resolution not to admit the plaintiff as a student of the said hospital, the plaintiff brought the present action. The plaintiff's statement of claim did not contain any particulars of the dates when, the places where, or the persons to whom, the alleged libel was published. After the statement of claim had been delivered, the solicitors for the defendant company served on the plaintiff's solicitor a notice requiring particulars in writing of the publication complained of, which request was refused. Believing that the plaintiff's objection to furnish the said particulars was due to a desire that a statement of defence should be delivered before he did so, the defendant company then filed and delivered a defence. The said defence contained a denial that the defendant company wrote or published the words complained of; a plea that the said words did not bear the meaning ascribed to them in the statement of claim, or any defamatory meaning whatsoever; a plea that the said words were no libel; and a plea that the publication (if any) of the said words by the defendant company was made *bona fide* in the belief that the said words were true, and without malice, and on a privileged occasion. In the particulars of the said plea of privilege it was stated that "the said words were published (if at all) by the defendants to a person or persons interested in, and entitled to be informed of, the defendants' decision upon the plaintiff's said application, and in performance of a duty towards such person or persons, and not in any way otherwise." After the said defence had been delivered, the solicitors for the defendant company, on the 21st May, 1909, repeated their request for particulars of the publication of which the plaintiff complained, which request was again refused. The defendant company thereupon, on the 28th May, 1909, instituted the present motion for an order that the plaintiff should furnish particulars in writing of the name or names of the person or persons to whom, the date or dates when, and the place or places where, the plaintiff alleged that the said alleged libel was published; and for an order that, upon default by the plaintiff in complying with such order, his statement of claim should be struck out, and the action dismissed with costs. The said motion was grounded upon an affidavit made by one of the solicitors for the defendant company, which stated that the

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K. B. Div. defendants were wholly unaware of the nature of the publication
 1909. (if any) of the alleged libel relied on by the plaintiff; and that
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 HOSPITAL. the said particulars were sought merely to enable the defendants
 to know what case they would have to meet, to limit the issues,
 and prevent surprise, and for no other purpose whatsoever. In a
 replying affidavit, filed on the 7th June, 1909, the plaintiff stated
 that the defendants were well aware of the persons to whom the
 words complained of were published, as they had in their possession
 all the information relative thereto. He also stated that his case was
 that the said words had been communicated by the defendants to
 the General Medical Council, to several dentists and doctors in
 Dublin, to their own Board of Governors, and to the Council of
 the College of Surgeons, and the members thereof.

From an affidavit made by the Registrar of the defendant
 company and filed on the 9th June, 1909, it appeared that on the
 1st June the plaintiff's solicitor had served a notice, requiring
 particulars of the names and addresses of the persons who were
 alleged by the defendants in their defence to be persons interested
 in, and entitled to be informed of, the defendants' decision upon the
 plaintiff's application for admission as a student, and to whom
 the resolution of the 18th May, 1908, was communicated. It also
 appeared that, in reply to this notice, a letter had been written by
 the solicitors for the defendant company stating that the defen-
 dants were not aware of any publication by them of the said
 resolution; and that the plea of privilege in their defence had
 been inserted with a view of meeting any publication which
 might be alleged, or attempted to be proved by the plain-
 tiff. The deponent stated that the defendants were "entirely
 ignorant of having published" the words complained of. Dis-
 covery of documents had been made by the defendant company
 before the present motion was instituted.

*T. M. Healy, K.C. (Chambers, K.C., and W. G. Gibson, with
 him), for the defendants:—*

The defendants are entitled to the particulars asked for:
Bradbury v. Cooper (1); *Roselle v. Buchanan* (2); *Jackson v.*

(1) 12 Q. B. D. 94.

(2) 16 Q. B. D. 656.

Wine (1); *Davey v. Bentinck* (2). If the plaintiff fails to give the particulars asked for, the action should be dismissed; the fact that he says he is unable to do so, is no excuse. It goes to show that the action is frivolous and vexatious: see the judgment of Lord Esher, M.R., at p. 188 of the report of *Davey v. Bentinck* (2).

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Campbell, K.C., and *Jefferson, K.C.* (*Joseph K. O'Connor* with them), for the plaintiff:—

The rule that the plaintiff must give particulars of the publication or publications on which he relies applies only to actions for slander; not to actions for libel: *Gouraud v. Fitzgerald* (3). Folkard on Libel and Slander, p. 240. All the cases cited by the other side, save *Davey v. Bentinck* (2), refer only to actions for slander: *Gouraud v. Fitzgerald* (3) was not cited to the Court which decided *Davey v. Bentinck* (2).

Particulars ought not to be ordered after a defence has been filed. It would be unjust to limit the plaintiff to the occasions of publication of which particulars were given; and if that were not done, particulars would be useless to the defendant: see the judgments of Pollock, B., and Manisty, J., in *Gouraud v. Fitzgerald* (3).

W. G. Gibson, in reply:—

In regard to the rule as to particulars, no distinction can be drawn between actions for slander and actions for libel: Odgers on Libel and Slander, p. 586. In both cases the cause of action must be based on a publication which occurred before the issue of the writ; a subsequent publication can be used only to aggravate damages. Lord Esher, M.R., who was a member of the Court which decided *Davey v. Bentinck* (2), was also a party to the decision in *Gouraud v. Fitzgerald* (3). The decision of the Court of Appeal in the latter case was not based on the ground that the rule as to particulars did not apply to actions for libel, but on the special facts of the case before them, viz., the defendants' delay in moving for the order sought: see the report of the case in 5 T. L. R. 80.

(1) 5 New Ir. Jur. R. 16. (2) [1893] 1 Q. B. 185. (3) 37 W. R. 55, 265.

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In the present case the plaintiff ought to have pleaded in his statement of claim the occasions of publication on which he relies :
Odgers on Libel and Slander, p. 582.

BOYD, J. :—

In this case the defendants have moved for an order that the plaintiff do furnish to the defendants full particulars of the name or names of the person or persons to whom, and the date or dates on which, and the place or places where, the plaintiff alleges that the words complained of in paragraph 10 of his statement of claim were published.

The action is for libel contained in a resolution passed by the Committee of the defendant Company, on the 18th May, 1908, and entered on the minutes of the meeting of the Committee. In a letter from the Registrar of the defendant Company, dated 20th October, 1908, the plaintiff was for the first time informed of the existence of the said resolution. Of course it would be impossible for the plaintiff to know who has had access to the record of the minutes of the said Committee, or to whom the same was shown. The defendant Company must know this, and by their present application they seek to have the action dismissed unless the plaintiff furnishes the particulars demanded.

So far as I have ascertained, no order similar to that asked for in this case has ever been granted in Ireland, in an action for libel such as the present.

In actions for slander, there are several cases in which the order has been made, but actions for libel and actions for slander are quite different, as the slander must have been promulgated to parties to whom, or in the presence of whom, it was uttered, and the plaintiff in such an action must know on what publication of it he relies. In an action like the present, the plaintiff can only know that a document containing the alleged libel was furnished to him by the Registrar of the defendant Company five months after it was written. The book in which it is written is in the possession of the defendants, and may or may not have been open for inspection—or the resolution may have been communicated by the defendants, or by their permission or negligence, to other parties. These are matters to be established at the trial

In the case of *Gouraud v. Fitzgerald and Others* (1) it was expressly decided that in an action for slander, but not in an action for libel, the particulars asked for would be ordered, and that at the trial the plaintiff might rely on matter not previously disclosed : see also *Hewson v. Cleeve* (2).

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There have been actions for libel in which particulars have been ordered, but there is a clear distinction in such cases from the circumstances in the present case. In *Folkard on Slander*, p. 240, the author states that the rule is applicable to slander only, and not to cases of libel : *Odgers* (ed. 1905), at p. 586, states that it applies to both classes of action.

On the facts of this case, I am of opinion that the application should be refused with costs.

Mr. Justice Madden has authorized me to say that he concurs in the judgment which I have delivered.

J. C. W.

The defendants appealed (3).

Appeal.
Oct. 27, 28.

Healy, K.C., and *W. G. Gibson* (with them *Chambers, K.C.*), for the appellants :—

We are entitled to these particulars which in England would be ordered as a matter of course : *Ord. III., R. 9 (Eng.)* ; *Odgers* (4th ed.), 586 ; *Roselle v. Buchanan* (4) ; *Gouraud v. Fitzgerald* (1). In that case, which was an action for libel, the jurisdiction to order particulars was conceded. There the application was not made until seven months after the commencement of the action, and after notice of trial had been served. The real ground on which an order for particulars was refused was the lateness of the application : see judgment of *Lopes, L.J.* Where a settled practice has been established in the English Courts, the Courts of this country are bound to conform to it : *Judicature Act (Ireland), 1877, section 61* : see *per Holmes, L.J.*, delivering the judgment of this Court

(1) 37 W. R. 55, 265.

PAILES, C.B., and HOLMES, L.J.

(2) [1904] 2 I. R. 536, 547.

(4) 16 Q. B. D. 656.

(3) In the Court of Appeal, before

Appeal. (reversing the decision of the Queen's Bench Division) in *Fisher v.*
 1909. *Nation Newspaper Co. and Rooney* (1).

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It is idle to say that these particulars will necessarily be disclosed at the trial. We are entitled to have them now to enable us to meet the case. In the present state of the law and practice in England, which the Courts here are bound to follow, defendants in an action like this are not to be left to go to trial blindfolded.

The Right Hon. J. H. Campbell, K.C., and D. S. Henry, K.C.
 (with them *Jefferson, K.C., and Joseph K. O'Connor*), for the plaintiff:—

The defendants are an incorporated company, and any libellous statement for which they could be liable in an action must have been embodied in a resolution, and recorded in their minute-book. The particulars sought for are, therefore, necessarily within the knowledge of the defendants. There is no settled English practice in favour of making an order for the delivery of such particulars. The authorities are rather the other way, drawing a sharp and very reasonable distinction between actions for oral slander and actions for libel. As to text-writers, Folkard (ed. 1908), p. 240, is diametrically opposite to the passage cited from Odgers, although the same authorities are referred to in support of each conflicting statement of the practice in England.

PALLES, C.B.:—

This appeal was opened on the ground that in England the particulars here sought by the defendants could be obtained as a matter of course, and *Fisher v. Nation Newspaper Co.* (2) was relied on to show that we should follow the English practice. Were I satisfied that this were the English practice, I should certainly follow it, and that notwithstanding that we have not any Rule of Court similar to Order III., Rule 9. That Rule does not in terms apply to such a case as the present. It is in these words:—"In actions for libel, the indorsement on the writ shall

(1) [1901] 2 I. R. 465, at pp. 486-488.

(2) *Ibid.* 479.

state sufficient particulars to identify the publications in respect of which the action is brought."

The meaning of that Rule is that the written document pleaded as a libel must be identified, but in the absence of authority I am unable to hold that under that Rule it is necessary in England to identify, not merely the document sued on as a libel, but also to state the occasions of its publication. I must consider the practice in England apart from the Rule in question.

The passage from *Odgers* is relied on (1):—"It is now settled practice that the defendant is entitled to particulars of the times when, and the persons to whom, the alleged slanders or libels were published, if such details are not given in the statement of claim."

On the other hand, in the edition of *Folkard* published in 1908 (2) it is said that it is not the practice to order particulars in actions of libel, and the same cases are referred to as are cited in *Odgers*. I have read all these cases, and they do not seem to me to support Mr. *Odgers's* statement.

Roselle v. Buchanan (3) was an action for slander, not for libel. It goes further than *Bradbury v. Cooper* (4), but in the latter case also the cause of action was slander. Pollock, B., in *Gouraud v. Fitzgerald* (5), based his judgment on the well settled distinction between slander and libel. In the former, it may be necessary to know the occasions of the alleged speaking to enable the defendant to be prepared to show (if the fact be so) that he was not present on those occasions.

From the time of *Early v. Smith* (6) up to the passing of the Judicature Act, whilst it was the practice in this country to order particulars of the occasions in slander, such particulars were undoubtedly not ordered in libel actions, except under special circumstances. *Gouraud v. Fitzgerald* went to the Court of Appeal (7), and was affirmed on the ground that the Court would not interfere with the discretion of the Divisional Court. For myself I agree with Baron Pollock's reasoning that these are

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(1) 4th ed. (1905), p. 586.

(2) Page 240.

(3) 16 Q. B. D. 656.

(4) 12 Q. B. D. 94.

(5) 37 W. R. 55.

(6) 12 Ir. Com. Law R., App. 35.

(7) 37 W. R. 265.

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matters essentially within the knowledge of the defendants and not of the plaintiff. The defendants have the means of answering the allegation made against them; for the act for which they are sued was one authorized by the defendants in their corporate capacity.

Being then of opinion that there is no practice established in England to order particulars in cases of this kind, and admitting that there is jurisdiction to make the order; as the Court below, in the exercise of its discretion refused the application, I decline to interfere with that discretion.

HOLMES, L.J. :—

In dismissing the appeal, I wish it to be understood that I am not laying down the proposition that the Court cannot order particulars in actions of libel; but I think, to entitle a defendant to such an order, a special case must be made, and they are not to be ordered in every case.

Where the defendants in an action of libel are a corporation, which can only be held liable for a libel authorized by a written resolution, if the defendants do not know the persons to whom, and the times at which, any publication of the alleged libel was made which would render them liable, it is impossible that anyone else could know. Therefore I start with the proposition that the defendants have knowledge of everything necessary to enable them safely to proceed with their defence, and I cannot see how they can be embarrassed by the Court refusing particulars, or benefited by granting them. I would therefore affirm the order of the King's Bench Division, unless satisfied that the practice in England is to give such particulars in all cases. I think the authorities are the other way.

In *Gouraud v. Fitzgerald* (1) Baron Pollock referred to the distinction between libel and slander; but he did not say that particulars could not be granted in actions of libel. When text books are cited, I always look at the authorities referred to. The authorities cited by Odgers do not support his proposition. In another text book the opposite is stated.

Therefore, coming to the conclusion that there are no special circumstances in the case showing that these particulars would be of any benefit to the defendants—on the contrary, that the circumstances are all the other way—and that there is no general rule established in England as stated by Mr. Healy, I hold that the decision appealed from was right, and must be affirmed with costs.

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Solicitor for the plaintiff: *Reuben J. Dodd.*

Solicitors for the defendants: *Orpen & Sweeny.*

W. G.

MURNANE, APPELLANT; ADAMS, RESPONDENT (1).

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Licensing law—License for house—Sale of spirits at bar in yard—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3. Jan. 14, 19.

A was the owner of a house, with a yard and offices at the rear, the whole being enclosed by walls, and he held a license authorizing him to sell spirits, etc., in the house, for consumption on or off the premises. He opened a bar at the end of the yard, having an entrance from a street at the rear of the premises, and sold spirits there:—

Held, that the license authorized a sale in the house alone, and that A was guilty of the offence of selling spirits at a place where he was not authorized by his license to sell the same.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held at Lisnaskea, county Fermanagh, the respondent was charged as defendant in a summons on the complaint of the appellant herein, the District Inspector Royal Irish Constabulary, with the two following offences:—(1) that defendant on the 12th July, 1909, at Lissoneill, in said district (Lisnaskea), county Fermanagh, being a person duly licensed to sell by retail in his licensed public-house, at Lisnaskea, county Fermanagh, for consumption on his licensed premises, did sell by retail spirits, wine, and beer, at a place where defendant was not authorized by his license to sell the same, to wit, at a temporarily

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. constructed bar about 100 yards from said public-house; and (2)
 1910. that defendant on the 12th July, 1909, at Lissoneill in said
MURNANE, district and county, did unlawfully expose for sale by retail
Appellant; intoxicating liquors, to wit, spirits, wine, and beer, being at a
ADAMS, place where he was not authorized by his license to sell the same.
Respondent.

At the hearing of the complaint the following evidence was given:—

Service on behalf of defendant of a notice of application to Quarter Sessions for transfer and confirmation of license to sell beer, wine, and spirits, by retail at his house was proved. (See form of this notice marked A, *post*, p. 177.)

Constable W. G. Pyne deposed: "I was on duty in Lisnaskea on 12th July, 1909. On the mountain road, leading to the new church, there is a gate which opens on the defendant's premises. On the date mentioned the said gate was open. About 12.15 p.m., I entered the said gate. I saw a bar inside the said gate about 4 yards from it, and bottles containing intoxicating liquors were exposed there for sale, and the defendant's cousin, Mr. John J. Adams, was in charge of the bar. At 3 o'clock p.m., I visited it again, and I saw a man named Morrison coming from the bar. There were drinking-vessels at the bar. I made the sketch marked B produced, of the premises (1). The point marked 8 indicates the defendant's shop in the main street. The point M M indicates the stables, which are two stories high; the underneath portion is used as stores. The house at M M separates the dwelling-house and small yard from the remainder of the premises. From B to C is portion of the main street. From C to D is the road leading from the main street past the new church. No. 9 is the gate inside of which the temporary bar was. From M M to the temporary bar is about 53 yards. From point 8 to C, and on to 9, is about 143 yards. Between the points 8 and C, there are three other shops belonging to other people." Cross-examined. "There is complete communication between 8 and 9, at back, but 9 is approached from 8 through the second story of M M by stairs. The entire premises are enclosed by walls and buildings."

. The officer of Customs and Excise for the district produced

(1) See sketch annexed.

the "Entry Book" kept in pursuance of 30 & 31 Vict. c. 90, *K. B. Div.* 1910.

The defendant produced his license (set out *post*, p. 178, marked D.) and certificate of valuation.

MURNANE,
Appellant;
ADAMS,
Respondent.

The defendant's solicitor contended that the defendant was authorized by his license to sell intoxicating liquors in the temporary bar, and the Justices, being of opinion that this contention was right, dismissed the complaint without prejudice, but on the application of the complainant stated the present case, requiring the judgment of the Court as to whether they were correct in point of law in their determination.

A.

NOTICE OF APPLICATION TO QUARTER SESSIONS FOR CERTIFICATE FOR PUBLICAN'S LICENSE.

Take notice that it is my intention to apply at the next Annual Licensing Quarter Sessions to be held at Newtownbutler, in and for the Division of Newtownbutler, and county of Fermanagh, on the 17th of October next, for a magistrate's certificate, to entitle me to receive a transfer and confirmation of a six-day license to sell beer, cider, and spirits by retail at my house, situate on the east side of the main street of the town of Lisnaskea in the townland of Lissoniel, barony of Magherastaphena, parish of Aghalurcher, and county of Fermanagh, at present in my occupation, and I reside therein.

Dated this 9th day of September, 1905.

EDWARD ADAMS, *Applicant*.

C.

ENTRY PAPER 74.

I, Edward Adams, residing at Lisnaskea, in the parish of Aghalurcher, in the county of Fermanagh, do hereby make entry of the house and premises occupied by me as my residence, for the purpose of exercising and carrying on therein the trade or business of a publican for the sale of beer, spirits, and wine, and do hereby further make entry of the under-mentioned rooms, now in or upon the said house and premises, to be used in connexion

K. B. Div. with the said trade or business for the purposes hereinafter
1910. assigned thereto, respectively, that is to say:—Bar and three
MURNANE, rooms adjoining each other, on the ground-floor as you enter
Appellant; from the main street, marked No. 1, No. 2, No. 3, and No. 4,
ADAMS, respectively, and one room on first floor, marked No. 5, for the
Respondent. purpose of storing and selling beer, spirits, and wine, for con-
 sumption on the premises.

As witness my hand this 30th day of January, 1906.

(Signed) EDWARD ADAMS.

Received by me, and signed by Edward Adams in my presence,
 this 30th day of January, 1906.

P. DONNELLY, *Officer, Clones Station.*

D.

IRELAND.—PUBLICAN'S LICENSE.

Dundalk Collection.

I, the undersigned, duly authorized by the Commissioners of
 Inland Revenue, hereby grant license to Edward Adams to exercise
 and carry on the trade or business of a retailer of spirits in a house
 situate at Lisnaskea, in the Parish of Aghalurcher, within the
 administrative County of Fermanagh, and known by the sign of a
 name, and to sell by retail therein spirits, wine, sweets, made wines,
 mead, metheglin, beer, cider, and perry, to be consumed either on
 or off the premises, from the day of the date hereof until and
 including the 10th day of October next ensuing, such house,
 together with the offices, courts, yards, and gardens therewith
 occupied, being of the annual value of £18; and I also hereby
 grant license to him to deal in and sell tobacco and snuff in the
 said house during the term above-mentioned, he having first paid
 for this license, being a six-day license, the undermentioned duties
 amounting to the sum of £7 2s. 4d.

Dated this 11th day of October, 1908.

Retailer of spirits,	.	.	.	.	£6	17	1
Dealer in tobacco,	.	.	.	.	0	5	3
Total,					£7	2	4

J. N. ARMSTRONG, *Collector of Inland Revenue.*

J. Linehan (with him *The Solicitor-General* (*C. O'Connor, K.C.*), *K. B. Div.* and *Dudley White, K.C.*), for the appellant:—

The respondent should have been convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquors at a place where he was not authorized by his license to sell the same. A clear distinction is drawn in the license between the house on the one hand, and the office, courts, yards, and gardens therewith occupied, on the other hand. The house alone is licensed. The offices, &c., are referred to merely with the object of setting out the annual value of the whole for the purpose of license duty under the provisions of section 43 of the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20). The entry made by the respondent in pursuance of section 10 of 3 & 4 Wm. 4, c. 68, specifically describes the rooms in the house in which the licensed business is to be carried on. Section 12 of 17 & 18 Vict. c. 89, may be relied on by the respondent as showing that the word "house" in the license includes all the premises; but that section plainly contemplates that part of the premises may be licensed and part not.

Drumgoole, for the respondent:—

The whole of the respondent's premises, including the temporary bar, are licensed, and not merely the house. Throughout the licensing code no distinction is drawn between "house" and "premises." The only distinction is between "licensed premises" and "unlicensed premises": Licensing Act, 1872, section 77. "Set of premises" is the expression used in 6 Geo. 4, c. 81, s. 10. No doubt in section 2 of 3 & 4 Wm. 4, c. 68, the word used is "house," but by section 12 of 17 & 18 Vict. c. 89, the word "house" in all Acts relating to the sale of spirits, &c., in Ireland is to be construed to mean and extend to every room, closet, cellar, yard, stable, out-house, shed, or any other place belonging or appertaining to the house. When a license is granted to a house without defining the metes and bounds, the house includes the curtilage: Patterson's Licensing Law (17th ed.), p. 172. [He also referred to *Marson v. London, Chatham, and Dover Railway Co.* (1); *Reg. v. Tott* (2); *Cross v. Watts* (3); *Penn v. Alexander* (4); *The Queen v. Raffles* (5); 6 Edw. 7, c. 39, s. 2.]

(1) L. R. 6 Eq. 101. (2) 4 L. T. (N. S.) 306. (3) 32 L. J., M. C. 73.

(4) [1893] 1 Q. B. 522. (5) 1 Q. B. D. 207.

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The Solicitor-General, in reply:—

MURNANE,
Appellant;
ADAMS,
Respondent.

The whole tendency of the licensing legislation has been to limit the meaning of the word "place." By section 7 of 6 Geo. 4, c. 81, the license is to set out merely "the place" at which the business is to be carried on. A slight attempt to limit the generality of this is made by section 10 of the same Act, by restricting a license to one separate and distinct set of premises. Under section 2 of 3 & 4 Vict. c. 68, what is to be licensed is a "house," and the notice of application for a license is to set out the situation of the house, including the road or highway on or adjacent to which it lies. In the present case the road so described is the main street. By section 10 of the last-mentioned Act the person obtaining a license is required to deliver to the Clerk of the Peace a note in writing containing, amongst other things, a description of the house and premises in which spirits, &c., are licensed to be sold by him, and the place where situate. Under this Act there was no reference to a part of a house, but the practice grew up of granting a license for part of a house, and this practice was recognized by section 12 of 17 & 18 Vict. c. 89. The license in the present case is for the house alone, and the entry made by the respondent in pursuance of 3 & 4 Vict. c. 68, s. 10, further limits the licensed premises to certain specified rooms in the house. [*Drumgoole*: That entry was made not under 3 & 4 Vict. c. 68, s. 10, but under 4 & 5 Wm. 4, c. 57, s. 5, as amended by 30 & 31 Vict. c. 90.]

None of the cases cited throws any light on the present case. *Marson v. London, Chatham, and Dover Railway Co.* (1) was a decision not under the Licensing Acts, but under section 92 of the Lands Clauses Consolidation Act, 1845. In *Reg. v. Tott* (2) the words in the license were large enough to include the outhouse, and the decision went on that ground. In *Cross v. Watts* (3) the question was merely one of fact, whether or not there was evidence on which the Justices could find that the bench formed part of the licensed premises. In *The Queen v. Raffles* (4) the new premises were substantially the same as those for which the license had been granted. In *Penn v. Alexander* (5) the only question was as to what constituted a *bonâ fide* traveller. *Cur. adv. vult.*

(1) L. R. 6 Eq. 101. (2) 4 L. T. (N. S.) 306. (3) 32 L. J. (M. C.) 73.
(4) 1 Q. B. D. 207. (5) [1853] 1 Q. B. 522.

LORD O'BRIEN, L.C.J.:—

This case, which has been very well argued on both sides here, and was also very well argued on both sides before the magistrates, raises a very important question. A man named Edward Adams, of Lisnaskea, in the county of Fermanagh, was charged on summons with two offences. I shall deal with the first charge only, because the considerations which determine it determine the second also. The first charge is:—"That the defendant on the 12th July, 1909, at Lissoniel in said district (Lisnaskea), county Fermanagh, being a person duly licensed to sell by retail in his licensed public-house at Lisnaskea, county Fermanagh, for consumption on his licensed premises, did sell by retail, spirits, wine, and beer, at a place where the defendant is not authorized by his license to sell the same, to wit, at a temporarily constructed bar, about 100 yards from the said public-house." That is the first charge in the summons; and if it had gone on to state that the temporarily constructed bar was within the premises connected with the public-house, it would raise the entire question which is raised in the case.

What are the facts? The original and permanent public-house, as distinct from the temporary bar, had an entrance which abutted on a public road. The temporary bar had another entrance abutting on another public road. This plainly appears from the map which has been given in evidence, and which, although only a rough sketch, I hope may be incorporated in the report of this case. I think that this temporary bar, having regard to its situation, was substantially and really another public-house. It had a separate entrance, and it had, what is the main characteristic of a public-house, a bar.

The Act of Parliament applicable to the case is the Licensing Act of 1872, section 3, which imposes penalties on a person selling intoxicating liquor at any place where he is not authorized by his license to sell the same. The dominating factor in the case is the license—the character—the precise extent of the license. Let me read it:—"I, the undersigned, duly authorized by the Commissioners of Inland Revenue, hereby grant license to Edward Adams to exercise and carry on the trade or business of a retailer of spirits"—Where?—"in a house"—that is, in the original

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 1910. “situate at Lisnaskea . . . and known by the sign of a name, and
MURNANE, to sell by retail therein”—that is, in such house—“spirits
Appellant; . . . to be consumed either on or off the premises, from the day of
ADAMS, the date hereof, until and including the 10th day of October next
Respondent. ensuing, such house, together with the offices, courts, yard, and
 gardens therewith occupied”—thus drawing a distinction between
 the house strictly so called, and the offices, courts, yards, and
 gardens therewith occupied—“being of the annual value of
 £18.”

Lord O'Brien,
 L.C.J.

Now, that license specifies in the very clearest terms where the liquor is to be sold, that is to say, in the original permanent public-house, as distinguished from the temporary bar. No doubt so far as valuation for the purpose of duty was concerned, all of these premises were regarded as one unit. But the ambit included for the purpose of duty is one thing, and the ambit included as being licensed is another.

As I have said, what has been done here has been to erect, although temporarily yet substantially and for a certain time, a second public-house. I do not think the license authorizes that. The place licensed is the original house proper, as distinguished from its surroundings. We must go by the license. We cannot extend it. I am therefore of opinion that the magistrates were wrong in their decision. I think, moreover, that this view is borne out by the application for a transfer which has been referred to.

I do not think that any of the cases cited gives us any real assistance : *Penn v. Alexander* (1) has no application, as it turned altogether on the question of what constituted a *bonâ fide* traveller. I prefer to rest my judgment on the character and true construction of the license itself.

MADDEN, J. :—

The offence for which Edward Adams was prosecuted is defined by section 3 of the Licensing Act of 1872. It is that of selling intoxicating liquors at a place “where he is not autho-

(1) [1893] 1 Q. B. 522.

rized by his license to sell the same." The place where the sale took place was at the end of a yard, at the rear of Adams's public-house, distant about 100 yards from his house, and opening on a different street. The excise license granted to Adams authorizes him to "exercise and carry on the trade or business of a retailer of spirits, in a house situate at Lisnaskea, in the parish of Aghalurcher, within the administrative county of Fermanagh, and known by the sign of a name." The place where the sale took place was within the ambit of the offices, courts, yards, and gardens occupied with the licensed house, which are set forth in the license for the purpose of assessing the duty payable under the 43rd section of the Inland Revenue Act of 1880. The duty under this section is imposed on "the annual value of the dwelling-house in which the retailer shall reside or retail spirits together with the offices, courts, yards, and gardens therewith occupied." These accessories of a licensed house are dealt with as being outside the place licensed for the sale of intoxicating liquors, although grouped with it for the purpose of assessing duty.

The place licensed for the sale of intoxicating liquor is defined by the terms of the license. The license may be so granted as to include a yard or garden attached to a public-house. In *R. v. Tott* (1), the defendant was licensed to sell "in the dwelling-house of the said Tott, and in the premises thereunto belonging." It was held that the defendant was rightly convicted of the offence of refusing to admit a constable to an out-house, in a yard at the rear of the dwelling-house, on the ground that Tott could if he chose have sold liquor in the out-house. I agree with my Lord in holding that the question to be decided in each case is as to the "place" in which the sale is authorized by the particular license, and that for this reason we get no assistance from decided cases. The decision of the question depends upon the construction of the particular license read in connexion with the provisions of the Licensing Acts. Where the license is granted in sufficiently wide terms to include premises attached to a dwelling-house, the entire of the premises are licensed, and constitute the "place"

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K. B. Div. within the meaning of the 3rd section of the Act of 1872, and
 1910. liquor may be lawfully sold on any part of the licensed premises.
MURNANE, Here the "place" is clearly defined, not only by the license,
Appellant; but in the notice upon which it was granted, which mentions
ADAMS, the house alone, adding "at present in my occupation, and I
Respondent. reside therein." The entry in the general entry book, kept for
 Madden, J. excise purposes, contains the words, "house and premises." These
 words, even if used in a general sense, could not have the effect of
 extending the right conferred by the license. But that this was
 not so intended appears from the remainder of the entry, which is
 limited not only to the dwelling-house, but to certain specified
 rooms in it.

The policy of the licensing laws requires that the sale of
 intoxicating liquors should be strictly confined to the place
 mentioned in the license. Take the case before us. In con-
 sidering the suitability of the house for which Adams applied
 for a license, an important consideration would be accessibility to
 the police for the purpose of surveillance. The place where Adams
 got up a bar is at a place distant from the house, and communi-
 cating with a different street. The suitability of this bar as a
 place for the sale of intoxicating liquors would not be inquired
 into upon the notice to which I have referred. If the contention
 of the defendant is well founded, a trader who has obtained, after
 full investigation as to suitability, a license for sale in a particular
 house, would be at liberty to open one or more different public-
 houses on land in his occupation quite distinct from the licensed
 house and only associated with it for the special purpose of
 assessing duties under a statute which was passed for the purpose
 of rendering liable to duty something different from that particu-
 lar place for which this license was granted. Such a view is
 opposed not only to the letter and spirit of the Licensing Acts,
 but to the reasonable construction of the license; and it is plain
 that it might lead to the gravest abuses.

WRIGHT, J. :—

I agree in the judgment pronounced by my Lord and my
 brother Madden, and have very little to add.

The summons charges two offences, but the same question

arises on each. The first is a charge of having sold spirits, &c., and the second of having exposed for sale, at (and this is the important and only question in the case) a place where the defendant was not authorized to sell the same.

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The facts have been already stated by my Lord. It appears that the defendant erected a temporary bar about 50 or 60 yards to the rear of his licensed house. The description of this bar will be found in the evidence of Constable Pyne given at the hearing, and set out in the case stated. The question is, was that bar a licensed place?

Wright, J.

The charge was brought under section 3 of the Licensing Act, 1872, which enacts that any person "selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his license to sell the same," shall be subject to the penalties mentioned in the section; and the only question in the case is, was the defendant authorized to sell at this temporary bar which he had erected 50 or 60 yards to the rear of the house?

Under the section I have referred to, I agree with my Lord and my brother Madden that the decided cases not merely do not determine this case, but that they give us very little assistance in determining it; but several sections of the different Acts throw some light on the question.

Section 7 of 6 Geo. 4, c. 81, provides that every license is to contain the true name and place of abode of the person or persons taking out the same, and the place at which the trade or business for which such license is granted shall be carried on.

Section 2 of the Licensing (Ireland) Act, 1833 (3 & 4 Wm. 4, c. 68), which was so much referred to in argument, deals with an application for a license made by a person not already licensed, and provides that such person in his notice of application shall set forth the situation and place of the house for which he desires to be licensed, as well in respect to the road or highway on or adjacent to which it lies, or otherwise, in a true and particular manner, specifying the town, townland, parish, barony, half barony, and if in a city or town, the street, square, lane, or other description of place, together with the number of such house if such house shall have been numbered, and also the place of abode of such person.

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A discussion arose as to the "entry" of the premises required to be made by the publican. There was some confusion as to this, but it is perfectly clear to my mind that this entry is one made for the purposes of Inland Revenue under 4 & 5 Wm. 4, c. 57, sect. 5, which is amended, in some particulars, by 30 & 31 Vict. c. 90. The important point is, that the entry is for the purposes of Inland Revenue. It is to set forth the house, building, room, or place in which the business is carried on; and accordingly the entry which was given in evidence in this particular case states as follows:—[His Lordship read the entry.] In connexion with that entry, and before I come to deal with the license, which is practically decisive of the present case, it is important to refer to section 12 of 17 & 18 Vict. c. 89. That section was passed for the purpose of extending the Act of 8 & 9 Vict. c. 64, which had given power to Justices and constables to enter any house or place licensed for the sale of spirits to be consumed elsewhere than on the premises, for the purpose of ascertaining whether spirits were being sold for consumption on the premises; and it for the first time recognized the principle that a license may be confined to a part of a house.

Reference has been made to the interpretation section (sect. 74) of 35 & 36 Vict. c. 94, and in particular to the definitions of licensed and unlicensed premises. I have considered the section carefully, and it appears to me to leave the case very much where it was, so that the question still remains the same, viz., whether, under the license that has been granted and is in force in the present case, the premises at the rear of the house are licensed premises or not. The license is in the following terms:—[His Lordship read the license].

Having regard not merely to the form of the license, which is to sell in the house alone, but also to the words and intention of the Acts I have referred to, particularly 17 & 18 Vict. c. 89, sect. 12, I am clearly of opinion that the license here authorizes a sale in the house and nowhere else.

Solicitor for the appellant: *Malachy Kelly.*

Solicitor for the respondent: *Henry Murphy.*

J. G. T.

THE KING (CURRID) *v.* BAKER (1).

*Local Government Board Audit—Certiorari—Security for costs—
 'Local Government Act (Ireland), 1871, s. 12—Practice.*

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Where a conditional order has been granted for a writ of *certiorari* to remove into the Court of King's Bench any allowance, disallowance, or surcharge made by an auditor of the Local Government Board in an audit under ss. 11 to 18 of the Local Government Act (Ir.) 1871, the Court has jurisdiction to stay the issue of the conditional order until the prosecutor shall have entered into and perfected an effective recognizance, with or without securities, as the exigency of the case, having regard to the means of the prosecutor, may require, conditioned in the terms prescribed by s. 12 of the said Act.

MOTION that a conditional order of *certiorari* to quash certain allowances in an audit of the accounts of a local government body should not issue, unless and until the prosecutor should have entered into and perfected a recognizance pursuant to the provisions of section 12 of the Local Government (Ir.) Act, 1871.

On 3rd December, 1909, the prosecutor, Thomas Currid, a rate-payer of the Pembroke Urban District, obtained a conditional order of *certiorari* to bring up and quash a certificate or report of J. A. Baker, Auditor of the Local Government Board, allowing a certain sum which the Council of the said district had ordered to be paid out of the rates.

The respondent, J. A. Baker, having seen a newspaper report of the prosecutor's application, requested the officer not to issue the conditional order until the prosecutor had entered into a recognizance in the form prescribed by the said Act. The matter having been brought to the notice of the Court which granted the conditional order, the present motion was, by leave, instituted on notice to the prosecutor, and the issue of the order stayed until the motion should have been disposed of.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and WRIGHT and DODD, JJ.

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Chaytor, K.C., and G. Dougherty, for the respondent.

Healy, K.C., and W. M'Grath, for the prosecutor.

The arguments were similar to those addressed to the Court of Appeal: see p. 190, *infra*.

LORD O'BRIEN, L.C.J.:—

A motion has been made in this matter that a *certiorari*—a conditional order for a writ of *certiorari*—do not issue unless and until the prosecutor, Mr. Currid, enters into and perfects a recognizance, pursuant to the provisions of the 12th section of the Local Government Act, 1871. There were some objections made by Mr. Healy of a preliminary character, as to the non-service of the conditional order, and the *locus standi* of Mr. Baker, which, however, were not pressed; and the argument in the end resolved itself into a question as to what was the true construction of the 12th section of the Local Government Act, 1871. It is, as I said during the argument, a question as to the tractability—the malleability—of the language used in the statute; the words “tractability” and “malleability” are used interchangeably in our law books.

A conditional order for a *certiorari* has been made at the instance of Mr. Currid, the prosecutor; and it was directed to Mr. Baker, the Local Government Board Auditor, on whose behalf the present motion is made.

What then is the language of the 12th section of the Act of 1871? The relevant portion of it runs thus:—“And it shall be lawful for every person aggrieved by any such allowance, and for every person aggrieved by such disallowance or surcharge, . . . to apply to the Court of Queen's Bench for a writ of *certiorari* to remove into said Court the said allowance, disallowance, or surcharge—(a) in the like manner and subject to the like conditions as are provided in respect of persons suing for writs of *certiorari* for the removal of orders of Justices of the Peace; (b) except that the conditions of the recognizance shall be to prosecute such *certiorari*, at the costs and charges of such person, without any wilful or affected delay, and if such allowance, disallowance, or surcharge be confirmed, to pay to such auditor, or

his successor, within one month after the same may be confirmed, his full costs and charges, to be taxed according to the course of the said Court." The general intention, the scope, and object of that section is plain: it is this—that those aggrieved within the meaning of the section are entitled to the issue of a writ of *certiorari*, so as to challenge the validity of those orders which are the cause of their alleged grievance.

This, as I said, is plain; and it is equally plain that the intention of the statute is that the person applying for the writ of *certiorari* should enter into a recognizance to secure, amongst other things, the costs of the person to whom it was intended that the writ should be addressed. This, I think, is also plain enough from the language used in providing for the character of the security to be given; in prescribing the measure of the security to be given; see the words of the statute after the words "except that." No doubt the Act says—and this is the ground of opposition—that the writ is to be granted on the same conditions as those upon which writs of *certiorari* are granted in the case of magistrates' orders, and there are no conditions in the case of such orders according to the practice here; but the general intention being plain, that a recognizance to secure the costs of the person whose action is impugned should be entered into by the person applying for the writ, and having regard to the maxim, "*Res valeat magis quam pereat*," I think that the 12th section should be construed as meaning that a recognizance should be entered into on the condition expressed in the statute, and there exhaustively set forth—that is to say, that a recognizance, an *effective* recognizance—I emphasize the word "effective"—should be given, so as to secure the defendant's costs; that is to say—the recognizance should be with or without sureties, as the exigency of the particular case, having regard to the means of the prosecutor, would, according to the discretion of the Court, require.

WRIGHT and DODD, JJ., concurred.

The curial part of the order was as follows:—

It is ordered that there be a stay on the said conditional order for a writ of *certiorari* dated 3rd December, 1909, until the said

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prosecutor, Thomas Currid, has entered into a recognizance, himself in the sum of £50, with two sufficient sureties in the sum of £25 each, to be levied upon their goods, and chattels, lands, and tenements, conditioned that he, the said Thomas Currid, shall prosecute such *certiorari* at his own costs and charges, without any wilful or affected delay; and that, if said allowance be confirmed, to pay to the said auditor or his successor, within one month after the same may be confirmed, his full costs and charges when taxed and ascertained, according to the course of the Court, then the recognizance to be void, or else remain in full force."

J. C. W.

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The prosecutor appealed (1).

W. M'Grath (*T. M. Healy, K.C.*, with him), for the prosecutor:—

There never was, and there is not now, any recognizance required in Ireland in the case of writs of *certiorari* for the removal of orders of Justices; and, therefore, it is impossible in a case such as the present to have a recognizance "subject to the like conditions" as are provided for the removal of orders of Justices of the Peace. Section 12 of the Local Government (Ireland) Act, 1871, was copied from the English Statute 7 & 8 Vict. c. 101, s. 35; but in England, by 5 Geo. 2, c. 19, s. 2, and by the Crown Office Rules, recognizances are required in the case of writs of *certiorari* to bring up orders of Justices. Neither the English statute nor the English practice can, however, be applied to cases arising in this country. This has always been recognized, as is shown by the settled practice which has prevailed since 1871, and the fact that no rules have ever been made for enforcing the provisions of section 12 of the Local Government (Ireland) Act, 1871, as to recognizances. This is the first occasion on which such a recognizance has been ordered.

No recognizance is necessary for the protection of the respondent, because section 12 provides that, unless an order to the contrary is made by the Court, an auditor is, in proceedings of

(1) In the Court of Appeal, before HOLMES and CHERRY, L.JJ.

this kind, to be paid his costs out of the rates. The Court cannot prescribe conditions for a recognizance under section 12, without first prescribing conditions for a recognizance in the case of writs of *certiorari* to bring up orders of Justices, but, even if the Court can prescribe conditions, there is no jurisdiction to depart from the words of section 12, which does not enact that the recognizance shall be with sureties.

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Chaytor, K.C., and G. Dougherty, for J. A. Baker:—

The intention of the Legislature is clearly expressed by section 12 of the Local Government (Ir.) Act, 1871, viz., that before an auditor is forced to defend his audit from what may prove to be an unfounded attack upon it, a recognizance should be entered into by the prosecutor to secure the auditor's costs in the event of the latter succeeding in the litigation. Effect can be given to this intention in either of the two ways:—(1) By applying the well-established principle stated in *Salmon v. Duncombe* (1) and in *Hardeastle on Statutes* (3rd ed., p. 104) that "where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity, or the absolute intractability of the language used." See also the judgment of Sir P. O'Brien, L.C.J., at page 355 of the report of *R. (Brown) v. Wicklow County Council* (2), the judgments of the Court of Appeal in England at p. 517 of the report of *Curtis v. Stovin* (3), and the judgment of Pollock, C.B., in *Salkeld v. Johnson* (4). (2) On the ground that the section contains within its four corners a complete and positive enactment that in cases like the present there shall be a recognizance irrespective of the question whether a recognizance is required in Ireland in the case of magistrates' orders, or not.

As to the first point, if there has been a mistake on the part of the draftsman (which we do not admit), it is due to the not uncommon confusion which arises where a section of an English Act is slavishly copied into an Irish Act without considering the surrounding circumstances. The section in question

(1) 11 A. C. 627.

(2) [1900] 2 Ir. R. 351.

(3) 22 Q. B. D. 513

(4) 2 Ex. at p. 273.

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is copied almost *verbatim* from section 35 of the Poor Law Amendment Act (7 & 8 Vict. c. 101), which in its turn, so far as a recognizance is concerned, is founded on the English statute 5 Geo. 2, c. 19, sect. 2. No doubt there is no provision in any Irish statute corresponding to that contained in 5 Geo. 2, c. 19, sect. 2. Nor is there in Ireland any provision dealing with the subject in the Crown Office Rules. The only rule which deals expressly with recognizances in cases where an application is made for a writ of *certiorari* is Rule 10, Wylie, p 1094, which is confined to cases of indictments found at assizes. There are, however, several of the Crown Office Rules which recognize the necessity for recognizances in civil cases on the Crown side of the Court: see in particular Rules 12, 16, and 91. Furthermore, although the Local Government (Ir.) Act, 1871, is an Irish statute, it does not necessarily follow that the reference to orders of Justices at Quarter Sessions is confined to proceedings before Justices in Ireland.

As to the second branch of our argument. The substance of the enactment in section 12 is the necessity of the recognizance therein mentioned. The reference to Justices' orders is merely descriptive of the machinery for applying for the writ of *certiorari*. The section itself prescribes the conditions of the recognizance; and the implied reference to recognizances in the case of Justices' orders may be rejected as superfluous.

M'Grath, in reply.

HOLMES, L.J.:—

Although I am satisfied that everything that could be said in favour of Mr. *M'Grath's* client has been put forward by him clearly and well, I have come to the same conclusion as the Divisional Court arrived at after full argument and careful consideration of the case. We have first to consider section 12 of the Local Government (Ireland) Act, 1871, which conveys clearly and distinctly the intention of the Legislature, namely, that when a person is aggrieved by an audit of accounts, and wishes to appeal against the decision of the auditor, by way of *certiorari*, he should, as evidence of his *bona fides*, enter into a

recognizance to prosecute such *certiorari*, and to pay the costs of the auditor, in the event of his not proving successful in his contention. I cannot read the section without coming to the conclusion that on its true construction the recognizance so to be entered into by the aggrieved person must be an effective recognizance.

If that was the intention of the Legislature in 1871, I do not think it could be argued that the fact that no application for such a recognizance has ever been made from that time to the present can affect the construction to be placed on the statute. Contemporary exposition of the meaning of a section is important provided there be an actual exposition of it, upon the question being raised or discussed; but the fact that nothing has been ever done under a certain section cannot alter the character of a statute.

Having come to the conclusion that the section requires or contemplates that this recognizance should be entered into by the aggrieved person, we next have to consider whether, that being the meaning of the section, it is interfered with by the circumstance that the Legislature fell into the misapprehension of thinking that there was a recognizance in use in this country, "in respect of persons suing for writs of *certiorari* for the removal of orders of Justices of the Peace"—a misapprehension which forms the basis of the appellant's argument.

As to this I think that the rule applicable is that which has been acted upon in many cases, and which should be acted upon in all, namely, that when a particular mode of entering upon a recognizance is erroneously described, it is a mere matter of form to substitute for that a real and effective recognizance. That is what the order of the King's Bench Division has provided for, and I entirely agree with the very clear judgment of the Lord Chief Justice. The appeal must be dismissed with costs.

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CHERRY, L.J.:—

I concur, and have nothing to add.

Solicitor for the appellant: *Lidwell*.

Solicitors for the respondent: *Montgomery & Chaytor*.

R. ST. J. C.

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PILKINGTON v. POWER (1).

Nov. 18. *Practice—Pleading—Action for the recovery of land—Tenancy at will—Writ specially indorsed—Vacating judgment—Surprise—R. S. C., I. (February 22, 1905), Order III., Rule 6 (F.).*

A claim for possession of lands held under a tenancy at will can be specially indorsed under Order III., Rule 6.

In an action for the recovery of lands by a landlord against a tenant occupying the lands under a tenancy at will, in respect of which a notice to quit had been served, the writ was specially indorsed with a claim for possession. The defendant made an offer of settlement, and stated that the offer was to remain open for a week. Before this period had elapsed, the plaintiff, without making any reply to the offer, signed final judgment in default of pleading.

On a motion to vacate the judgment on the grounds (a) of surprise, and (b) that the claim did not come within the scope of Order III., Rule 6.

Held, by the King's Bench Division that there had been no surprise.

Held, by Boyd and Wright, JJ. (*dissentiente* Andrews, J.), that the claim could be specially indorsed under Order III., Rule 6, and that the judgment should only be set aside upon terms: *Kemp and another v. Lester* ([1896], 2 Q. B. 162) applied.

MOTION to set aside a judgment entered in default of pleading.

The action was brought to recover possession of certain premises known as 108 Amiens Street, in the City of Dublin, of which the plaintiff was landlord. The premises in question had originally been sub-let to the defendant by one Merriman, who had held them along with the premises known as 109 Amiens Street as tenant of the plaintiff. In an action between the plaintiff and Merriman, the plaintiff obtained judgment for possession of the premises 108 and 109 Amiens Street. The writ of possession in that action was executed on the 5th November, 1908, upon which date the defendant signed a statutory acknowledgment under section 94 of the Landlord and Tenant Act (Ir.), 1860 (1),

(1) This acknowledgment was made in the form—Form 7—prescribed by Schedule A to the said Act.

whereby he became tenant at will to the plaintiff of the premises 108 Amiens Street; negotiations were then pending between the plaintiff and the defendant for a lease to him of the premises 108 and 109 Amiens Street. A correspondence ensued; and, a dispute having arisen as to the terms of the proposed lease, the plaintiff treated the contract as rescinded on the part of the defendant, and on the 9th September, 1909, served the defendant with a notice to quit. On the 14th September the plaintiff issued a writ, which was specially indorsed as follows:—

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STATEMENT OF CLAIM—"The plaintiff is entitled to the possession of the house and premises No. 108 Amiens Street, in the City of Dublin, held by the defendant by the license and at the will of the plaintiff, by virtue of an acknowledgment pursuant to 23 & 24 Vict. c. 154, sect. 94, dated the 5th November, 1908, and signed by the defendant, which said tenancy was duly determined by notice in writing dated the 9th September, 1909. The plaintiff claims possession and £30 for mesne profits."

An appearance was entered for the defendant on the 24th September; and on the 30th September the plaintiff served a notice of motion for final judgment. The defendant by a letter of the 14th October made an offer of compromise which was not accepted; and on the 27th October the motion was heard and refused. The case made by the defendant as a defence to the motion was that he was in possession under an agreement for a lease, which agreement he alleged was contained in the correspondence. On 5th November, the defendant wrote, renewing the offer of compromise which he had previously made, and stating that it was to remain open for one week only. No reply was sent to this letter. The defendant's time for delivering a defence expired on 6th November; and, no defence having been delivered within that time, the plaintiff on the 8th November entered final judgment in default of pleading.

On 15th November, the defendant served a notice of motion to set aside the judgment with costs upon the following grounds:—

(1.) That the judgment was entered against good faith, and while negotiations for a settlement were pending.

K. B. Div. (2) That the judgment had been irregularly entered, the
 1909. irregularities relied on being—(a) that the writ of summons
PILKINGTON is not specially indorsed; (b) that the plaintiff's claim in this
v. action does not come within the scope of Order III., Rule 6.
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The notice of motion asked in the alternative to have the judgment set aside on such terms as the Court should direct.

John Bartley, for the defendant:—

Order III., Rule 6, only applies when the action is brought by a landlord against a tenant whose term has expired or been duly determined by notice to quit. The existence of a term is necessary in order to bring an action of this class within the Rule. A tenancy at will is not a term. A term is defined by Blackstone as an estate the duration of which is bounded, limited, and determined, for every such estate must have a certain beginning and a certain end: Blackstone's Commentaries, Book II., p. 143. A tenancy at will is not bounded by definite limits with respect to time: Carson's Real Property Statutes, p. 138, citing Co. Litt., sections 68, 82.

In *Kemp v. Lester* (1), which is cited in the Annual Practice as an authority for the proposition that a tenancy at will comes within Order III., Rule 6, the tenancy was in fact a tenancy from year to year, created by an attornment clause in a mortgage, with a proviso for immediate determination. The same observation applies to *Hall v. Comfort* (2), which is also cited in the Annual Practice as an authority for that proposition.

This question is fully discussed in Cavanagh on Summary Judgments under Order XIV., at p. 479; and the opinion there expressed is that a tenancy at will does not come within Order III., Rule 6.

The judgment has been signed by surprise. When it was signed, the defendant's offer of settlement was still open; and no refusal had been received from the plaintiff.

O. Murphy, for the plaintiff:—

There has been no surprise. The plaintiff was not bound to refuse the defendant's offer before signing judgment. Otherwise

(1) [1896] 2 Q. B. 162.

(2) 18 Q. B. D. 11.

a defendant could, by making repeated offers, indefinitely extend his time for pleading, and evade judgment. K. B. Div.
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The claim can be specially indorsed: *Kemp v. Lester* (1); see especially the judgment of Rigby, L.J., at p. 164 of the report. PILKINGTON
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Bartley, in reply:—

Kemp v. Lester (1) is distinguishable. The passage cited from the judgment of Rigby, L.J., is merely a *dictum*.

ANDREWS, J.:—

Having regard to the grounds upon which a motion for final judgment in this action was refused by us on the 27th of October last, we are all agreed that the defendant should be allowed to present his case in answer to the plaintiff's claim, and that the judgment which has been entered should be set aside. We do not, however, agree upon the question whether the claim in this action is one which can be specially indorsed on the writ pursuant to Order III., Rule 6.

I am of opinion that it cannot be so indorsed, notwithstanding what was said by Rigby, L.J., in *Kemp v. Lester* (1). The point was not argued in that case, and the facts of that case were different. The ejectment was brought in respect of a tenancy from year to year created by an attornment clause in a mortgage deed, subject to a proviso enabling the mortgagee at any time, without giving previous notice of his intention to do so, to take possession of the premises, and determine the tenancy created by the attornment.

I think that the following words of Order III., Rule 6, viz., "actions for the recovery of land . . . by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit," do not apply to the case of a tenancy at will. The expression "term" in this connexion does not appear to me to be applicable to the interest of a tenant at will, which is indefinite, and depends upon the will not only of the landlord but of the tenant. If the plaintiff's claim is one which cannot be

(1) [1896] 2 Q. B. 162.

K. B. Div. specially indorsed, it would follow that, as no statement of claim
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 Andrews, J. me in this case, however, only affects the question of costs.

BOYD, J. :—

I am of opinion that judgment has been regularly signed, and that it should only be set aside upon terms.

WRIGHT, J. :—

We are all agreed that at the time when this judgment was entered there was no compromise pending, and that there has not been any breach of faith on the part of the plaintiff's solicitor. The order refusing the plaintiff's motion for final judgment was made on 27th October, and the defendant should have filed his defence on or before 6th November. The expense of doing so would have been only a few shillings. The necessity for the present motion has been brought about by the defendant's default; and, in my opinion, he can obtain relief only under Order XXVII., Rule 17. It is idle for a defendant to suggest that he can extend his time for pleading by the simple expedient of making an offer of compromise to the plaintiff or his solicitor, and then contending that, until the offer has been refused, there has been a compromise pending. That point has been already disposed of by the present members of this Court in the case of *Quin v. Kennedy* (1), in which a similar argument was unsuccessfully advanced.

A further question, however, arises in the present case, namely, whether the plaintiff's claim is one which can be specially indorsed under Ord. III., Rule 6. The writ is indorsed with a claim for possession of the premises therein described, "held by the defendant by the license and at the will of the plaintiff by virtue of an acknowledgment pursuant to 23 & 24 Vict. c. 154, section 94," and the writ avers that the tenancy was duly determined by notice in writing. The tenancy in question being a tenancy at will, we have to decide whether it comes within the scope of Order III.,

(1) K. B. D.—Nov. 12, 1909.

Rule 6. There is no express decision on the point, the case which most nearly resembles it being *Kemp v. Lester* (1). In that case the lands, possession of which was claimed, were held under a tenancy from year to year created by an attornment clause in a mortgage deed, and determinable at the will of the mortgagee without notice. The language of Rigby, L.J., in that case, although it may amount only to a *dictum*, commends itself to me. If the meaning of the word "term" in Order III, Rule 6, is to be restricted to the exact definition of a term in Coke upon Littleton, it cannot apply to a tenancy at will; but, in my opinion, adopting the language and the reasons of Rigby, L.J., in the above case, the word, as used in the Rule, can be construed as including a tenancy at will which has been duly determined.

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Wright, J.

I may add that I think it is very inconvenient that this point should be raised upon the present motion. If the defendant had intended to rely upon it, it should have been put forward in the form of a preliminary objection to the motion for final judgment, upon which the Court made no rule, and a decision then obtained upon it.

Solicitors for the plaintiff: *Hogan & Sons.*

Solicitors for the defendant: *O'Neill & Collins.*

J. C. W.

(1) [1896] 2 Q. B. 162.

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TOPPIN v. COLEMAN (1).

Feb. 14.

Licensing Acts—"Structural Separation"—*Movable net-work*—*Sale of Intoxicating Liquors (Ireland) Act, 1906, s. 2 (6 Edw. 7, c. 39).*

A wire net-work which is constructed on a wooden frame fastened with bolts to the walls, and is of such a character that liquor could be passed through it by an expedient, is not a "structural separation" within the meaning of 6 Edw. 7, c. 39.

A movable structure which is dependent for its attachment and detachment on the volition of the publican and his servants, and which might be left unattached through their negligence, is not a "structural separation."

Per GIBSON, J.—What the statute contemplates is something structurally annexed to the premises, operating as a permanent or *quasi* permanent separation.

CASE STATED.

The following is a copy of the case as stated by the Justices:—

At a Petty Sessions holden in and for the Petty Sessions district of Queenstown, county of Cork, on the 19th day of January, 1910, before us, the undersigned Justices of the Peace, acting in and for the said county of Cork, in the Petty Sessions district aforesaid, one Michael Coleman, the above-named defendant, was charged in and by a certain summons for that:—

1. He being a person duly licensed to sell intoxicating liquors by retail at his licensed premises, 17, 18, and 19 West Beach, Queenstown, did at a time prohibited by law, and at a period during which such licensed premises are by law required to be closed, to wit, at 10 o'clock, p.m., on Saturday, the 4th day of December, 1909, unlawfully open such licensed premises for the sale of intoxicating liquors against the form of the statute in such case made and provided; and

2. He being a person duly licensed to sell intoxicating liquors by retail at his licensed premises at 17, 18, and 19 West Beach,

(1) Before LORD O'BRIEN, L.C.J., GIBSON and MADDEN, JJ.

Queenstown, did, at a time prohibited by law, and at a period during which such licensed premises are by law required to be closed, to wit, at 10 o'clock, p.m., on Saturday, the 4th December, 1909, unlawfully keep open such licensed premises for the sale of intoxicating liquors against the form of the statute in such case made and provided; and the parties respectively being then present, the charge was duly heard before us, and on such hearing we adjudged it to be dismissed on the merits.

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And whereas the said Henry Toppin, D.I., hath, pursuant to the provisions of the aforesaid mentioned statute, given us notice, and required us, to state and sign a case, setting forth the facts and ground of our determination upon the hearing of the said complaint, in order that he might take the opinion of the Court thereon.

Now we, the said Justices, pursuant to the said notice and the provisions of the said statute, do hereby state and sign such case as aforesaid, as follows:—

The only witness examined for the prosecution was Sergeant Deeney, R.I.C., Queenstown, who swore that Mr. Coleman (who has recently taken over the premises in respect of which the prosecution took place, and who has spent a considerable sum of money in making the addition of a tobacco shop and billiard-room) was present during the operation of fastening a structure erected, which separates the shop in which the sale of drink is carried on and the billiard-room and tobacco-shop, and that it occupied a space of about fifteen minutes to unfasten and remove the said structure, and that it would probably take another fifteen minutes to replace and refasten the said structure, but that with a number of people working at each side of the structure the time could be reduced somewhat. This, Sergeant Deeney swore, was his evidence in a previous case against Mr. Coleman, and that on his (Sergeant Deeney) visiting the premises of Mr. Coleman, this structural separation referred to was in place, fastened and secured, on the 4th December, 1909.

We, the undersigned magistrates, with the exception of John W. Attridge, adjudicated on a prosecution against Mr. Coleman by the same complainant on a charge similar to the present, on the 11th November, 1909, and on that occasion we took the trouble of

K. B. Div. visiting the premises of Mr. Coleman, and inspected same, and
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COLEMAN. the structural separation in question, and we then found as follows:—There is a door leading from the rear of bar to a lavatory and to a walled-in storage cellar, from which there is no exit; this door also opens up connexion, first with the billiard-room, and then with the tobacco-shop, the entrance to the billiard-room being 16 feet from the said rear door of bar. About nine feet outside of this rear-bar door, and enclosing the cellar, from which there is no exit, there is a solid wooden structure, 8 feet high by 6 feet 3 inches broad, permanently closed in at top, into which two wooden frames fit. These frames are fitted with about eighth-inch wire up and down, three-quarter inch apart, with a stouter wire across, 4 inches apart, making a solid network of each frame. Across the middle of the solid wooden structure referred to, a wooden bar fits in, outside of which, that is, on the billiard-room side, the two wire network frames fit, one overlapping the other. These two frames are secured as follows:—Four bolts, 5 inches long by $\frac{1}{2}$ -inch, run through the wire network frames, through the wooden bar, which fits into the solid wooden structure. These four bolts are secured by nuts which fit on the bolts on the bar side of the structure. In addition to these bolts and other fastenings the frames are secured by screws $3\frac{1}{2}$ -inches by $\frac{1}{2}$ -inch, which screw threaded steel plates into one of the side uprights.

Sergeant Deeney, the witness for the prosecution, swore that no alteration whatever had taken place in the said structure, or in its method of fastening, since the 11th November last, and we have since had a further inspection of Mr. Coleman's premises, and we have confirmed Sergeant Deeney's evidence in this respect.

It will thus be seen that it is an absolute impossibility to open up communication with the bar as from the billiard-room or tobacco-shop side when the structure referred to is secured in place; and that there is, therefore, not the remotest possibility of inter-communication as between that portion of the premises in which the sale of drink is carried on and the tobacco shop or billiard-room unless the structure is removed, the removal of which can only be effected by first entering the bar, unlocking

the bar door (rear), and coming out into the space of nine feet, and undoing the several fastenings which secure the structure; and which so thoroughly make it an absolute impossibility for the publican to, in a short space of time, and at his will and pleasure, open up communication with the bar during prohibited hours, as sworn to by Sergeant Deeney.

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The decided cases mentioned to us all had reference to structural separation solely by means of a door, which was governed with a key which, according to the eminent Judges' opinion, could be kept in a convenient pocket, and the door opened at the volition and pleasure of the publican—an operation which could be performed so quickly that it is apparent it would be easy for a publican, whose only structural separation of that portion of the premises used for the sale of drink, and that in which he carries on other business, was of that kind, to, if he felt so inclined, sell drink surreptitiously during prohibited hours, realizing all he would have to do would be to turn a key—an operation of a few seconds. We could not help thinking if separation in the shape of brick, or stone and mortar—which could be the only alternative to the present structural separation—was in the minds of their Lordships when they were deciding the various other cases they would have stated so.

No evidence whatever was placed before us by the complainant showing that that portion of the licensed premises in which the sale of drink is carried on was open for the sale of drink or that any drink whatever was supplied.

We might add that we consider it somewhat unfair that we should again be called on to state a case on what we consider a similar charge to that adjudicated on by us on the 11th November last, when we were then called on to state a case, which we did at length, and which case stated was forwarded to the Chief Crown Solicitor, for Ireland, Mr. Malachy Kelly, who on the 29th November last decided that our case stated would not be proceeded with, and which impresses us with the belief that Mr. Malachy Kelly approved the decision arrived at by us in that case.

Contrasting the mere locking of a door and the unfastening of same with the method of separation in this case, we the under-

K. B. Div. signed magistrates were and are of opinion that the structural
 1910. separation as erected by the defendant in this case is a structural
 TOPPIN separation within the meaning of the Act; and we therefore
 v. dismissed the charge on the merits.
 COLEMAN.

It is this judgment which His Majesty's High Court is asked to decide the validity or otherwise of; and if in the opinion of their Lordships our decision is wrong in point of law, we will act as directed by their Lordships.

RICHARD SWANTON.

A. COUTTS HOME.

CHARLES O'CALLAGHAN.

MATTHEW AMBROSE.

J. W. ATTRIDGE.

Linehan (with him *The Solicitor-General*) for the appellant. The structure should be something of a permanent character. This is not permanent, and drink could be passed through the wires.

The Hon. Cecil Atkinson, for the respondent, relied on the character of the structure, and referred to *Brigden v. Hughes* (1) and *Hoddinot v. Home & Colonial Stores* (2).

[LORD O'BRIEN, L.C.J.:—To say that a thing which can be put up and taken down at pleasure amounts to a structural separation is going a long way.

GIBSON, J.—You observe the words of the section are “structurally separated” not “closed.”]

The Solicitor-General (*C. A. O'Connor, K.C.*), in reply:—

The purpose for which the statute required the structural separation is to prevent drink being conveyed from one part of the premises to another. The continuance here does not do that with any reasonable degree of certainty. The separation must be a “fixture,” *i.e.*, it should be something which cannot be removed without injury to the freehold.

[BOYD, J. This is a “temporary” separation, but not a “structural” separation.]

(1) [1876] 1 Q. B. 330.

(2) [1896] 1 Q. B. 169.

The separation must be of a permanent character to satisfy the statute. [Counsel referred to the judgments of Madden, J., and Kenny, J., in *R. (Richardson) v. Sweeney* (1).]

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LORD O'BRIEN, L.C.J. :—

We are all of opinion that this is not a “structural separation.” First, the so-called net-work—a photograph of which we have before us—certainly does not amount to a structural separation within the meaning of the statute, for drink could easily be supplied through it; secondly, the structure or frame-work, as distinguished from the wire net-work, takes according to the evidence about fifteen minutes to put up, and about the same number of minutes to take down; and that also in my opinion cannot amount to a structural separation within the meaning of the statute; for whether it shall be up or down at any given time depends on the volition of the owner of the public-house or his servants. The movability of this whole structure from time to time, at the mere volition of the publican or his servants, and especially the fact that it might be left open through their negligence, shows beyond all doubt that it is capable of admitting easy communication between different sets of premises, and thus defeating the intention of the statute. I do not like binding myself down to any rigid definition of what “structural separation” means; but I think this is not such a separation, because whether it is up or down depends on the volition of the owner of the public-house and his servants—and indeed the place might be left entirely open through their negligence.

GIBSON, J. :—

I concur. Without attempting a definition, I think that the arrangement described was not a “structural separation.” First, liquor could be conveyed between the wires by an obvious expedient. Secondly, apart from this fatal objection, the attachment and detachment of this movable contrivance depend on the will and action of the owner and his staff, who, on the one hand,

K. B. Div. might omit to put and fix it in position, and who, on the other, could
1910. detach it, when fixed, without difficulty. What the statute con-
TOPPIN templates is something structurally annexed to the premises,
v. operating as a permanent or *quasi* permanent separation, and not
COLEMAN. dependent for its efficiency on the casualties of volition, honesty,
Gibson, J. or neglect, of a human agent.

BOYD, J. :—

The statute has been careful to show what kind of separation must exist. It must be a “structural separation.” Now we are asked by the magistrates if they are right in law in construing this thing as a “structural” separation between the premises. It has been pointed out that there is nothing to prevent drink being served abundantly through this wire device from one side to the other. That I think is fatal to the whole of this so-called structure. To be structurally separated, the premises must be so separated as not to be capable of being opened or shut at any moment. The separating structure must be something so attached to the premises that it would be an injury to the premises to remove it. It must not be a mere removable thing that can be taken away and put back again. I concur in the judgment that the magistrates were not right in law.

Solicitor for the appellant : *Malachy Kelly.*

Solicitor for the respondent : *A. H. Allen.*

J. M.

STEELE v. MAHON (1).

Appeal.
1909.

Parliamentary franchise—Inhabitant householder—Dwelling-house—Easement enjoyed by another party—41 & 42 Vict. c. 26, s. 5—“Sole and exclusive use”—Part of a house separately occupied.

Nov. 8, 9,
15, 16.

Where the franchise is claimed under 41 & 42 Vict. c. 26, s. 5, in respect of part of a house alleged to be separately occupied as a dwelling, there must be sole and exclusive use by the occupier of that statutory dwelling-house: and such sole and exclusive use is negatived by the existence of an easement, such as a right of passage enjoyed as of right by another party, over any part of the premises which constitute the statutory dwelling-house.

M^r Bride v. Bryans, [1908] 2 I. R. 329, reconsidered by the full Court of Appeal and, after re-argument, adhered to and followed.

APPEAL from the decision of Mr. J. S. Baxter, one of the Assistant Revising Barristers of the Borough of Londonderry.

The case stated was as follows:—

At a Court for the Revision of the Lists of Voters for the County Borough of Londonderry, held on the 16th September, 1909, and following days, the name of John Steele appeared on the Town Clerk's List (No. 21) of claimants for the West Division of the said County Borough as follows:—

“171, Steele, John, 39 Abbey Street, Inhabitant Householder, dwelling-house, being exclusive occupation of front room, ground and back room, 1st flat, and so much of a kitchen as is not occupied by a right of way, passing in a straight line from the door communicating between a common hall and the said kitchen and a common yard, 39 Abbey Street.”

The said name was duly objected to.

It was admitted that the claimant had sub-let a room upstairs to a sub-tenant named Dunn, who passed through the kitchen to the yard. The facts of the case are identical with those of *Coyle v.*

(1) Before LORD O'BRIEN, L.C.J., THE MASTER OF THE ROLLS, PALLES, C.B., and HOLMES, L.J.

Appeal.
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Mahon (1) and *Green v. Mahon* (1), decided last year by the Court of Appeal; and the names of the claimant and of the other persons set out in the schedule hereto were included in the schedules to *Coyle v. Mahon* (1) and *Green v. Mahon* (1); there was no change in the circumstances. It was contended that on the description in the fourth column it was open to me to hold that the case was distinguishable from *Coyle v. Mahon* (1).

I found as a fact that the words in the fourth column (2) accurately described the qualifying premises.

I also found that the sub-tenant could get in or out, to and from his rooms to the street, without passing through the claimant's kitchen. I was unable to distinguish the case from *Coyle v. Mahon* (1), and expunged the name.

The question for the Court of Appeal is—Whether I was right in law in so deciding? If not, the name is to be restored.

The cases of the persons included in the schedule hereto are identical with this case, and are to be ruled by it.

I name the objector, James A. Mahon, and Sir F. Henry Miller, Town Clerk, as respondents.

J. S. BAXTER.

The arguments were opened on the 15th November, 1909, before the Lord Chief Justice, Palles, C.B., and Holmes, L.J., when *A. M. Sullivan, K.C.* (with him *Patton*), was heard for the appellant. On the close of the second day's argument (16th November) *Henry, K.C.* (with him *Osborne*), having partly opened the argument on behalf of the respondents, the Court intimated, as was afterwards held, that the case was undistinguishable on its facts from *M'Bride v. Bryans* (3), and that if that case was to be reviewed, it would be necessary to have a re-argument before a full Court of Appeal. *Sullivan, K.C.*, having stated that the question raised was of exceptional importance, having regard to the great number of claimants whose rights were affected by it, and that the appeal was brought mainly to challenge the decision in *M'Bride v. Bryans* (3); the case stood over for the attendance of

(1) [1908] 2 I. R. 622.

(3) [1908] 2 I. R. 329.

(2) This was substantially the same as set out above.

the Master of the Rolls, and was resumed on November 15th and 16th.

Appeal.
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STEELE
v.
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Healy, K.C., and A. M. Sullivan, K.C. (with them Patton), for the appellant:—

The Representation of the People Act, 1867 (30 & 31 Vict. c. 103, sect. 3), extended to Ireland by 48 Vict. c. 3, after conferring the occupation franchise in boroughs, excludes joint occupiers of a dwelling-house. Dwelling-house is defined in section 61 as "any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." The sole question is, Was the claimant in separate occupation of a dwelling-house? He has the exclusive occupation of two rooms and the use of the kitchen. Take it either way:—First, that he is in occupation of the whole kitchen subject to a right of way; or secondly, that he is in occupation of so much of the kitchen as is not occupied by the passage. If the first alternative be adopted, we admit that it is impossible to distinguish *M'Bride v. Bryans* (1). But is that case good law? According to the report no authority was cited. In this numerous class of cases, who is in occupation of the kitchen? Certainly not the occupier of the upper story; therefore the claimant must be the occupier: *Hardy's Case* (2). The most the person upstairs had was an easement. Does that destroy the right to the franchise, the right of way across the kitchen being an incorporeal right? The exact contrary was decided by this Court in *Torish v. Love* (3). See also *Reg. (Callaghan) v. Justices of Donegal* (4). The difference between use and easement is shown in *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (5). Lord Herschell said (at p. 120), "In consequence probably of the line of argument, the case appears to have been treated by the learned Judges" (*i.e.*, in the Court of Appeal) "as one in which the only alternative views were ownership or easement. I do not think this is so"; and (at p. 126) he says, "Where a person already in possession has given to another

(1) [1908] 2 I. R. 329.

(4) [1880] 2 I. R. 652.

(2) 4 Ir. Jur. N. S. 125.

(5) [1895] A. C. 117.

(3) [1894] 2 I. R. 372.

Appeal.
1909.

STERLE
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possession of part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation ; but the occupation of the landlord is paramount, that of the lodger subordinate." And Lord Macnaghten said (p. 127), " The question in each case must be, whether there is in fact such an occupation as, according to the Statute of Elizabeth, and a course of decisions which have been recognized and established as law, carries with it liability for rating purposes." In *Cory v. Bristow* (1), another case as to rateability, Lord O'Hagan said (p. 279), " The occupation to which it " (rateability) " is attached must be an actual, an exclusive, and a profitable occupation." And Lord Blackburn (p. 283) said, " Who was the occupier? Were the plaintiffs merely persons having an easement without occupying, or were they the rightful occupiers? " Could persons here be rated for the use of the passage? See *M'Laughlin v. Chambers* (2), *Bradley v. Baylis* (3), *Miller v. Horish* (4) as to the distinction between separate occupation as an inhabitant occupier and occupation as a lodger. In *Riddall v. Maguire* (5) the eldest son of a tenant in fee-simple who died intestate was held to be in sole occupation for the purposes of the franchise, although the widow continued to reside on the qualifying premises. A similar case is *Campbell v. Chambers* (6) : *Boylands v. Lloyd and Martin* (7) was the case of tenants holding separate farms, but residing together and working the farms jointly. They were held separate rated occupiers. In *Magee v. Colquhoun (Evans' Case)* (8), it was held that the voter was in sole occupation, although under his father's will his mother was entitled to reside in the qualifying premises " with full and free liberty of all the house," but particularly a room described. So also in *Brewer v. M'Gowen* (9), the claimant was held entitled, though he had let to a lodger the exclusive use of a bedroom and the joint use of a sittingroom. See p. 245,

(1) 2 App. Cas. 262.

(2) [1896] 2 Ir. 497.

(3) 8 Q. B. D. 195.

(4) Laws (1885-1893), p. 358.

(5) 25 Ir. L. T. R. 83.

(6) 20 L. R. I. 239.

(7) 24 Ir. L. T. R. 110.

(8) Laws (1885-1893), p. 85.

(9) L. R. 5 C. P. 239.

where Brett, J., explains the object of the proviso in section 3 of 30 & 31 Vict. c. 102. *Campbell v. Farren* (1) is the converse of this case. There the occupier of the upper story was held to occupy separately, independently of the right of way. *Torish v. King* (2), p. 211, was a case of agistment, and *M'Farland v. Torish* (3) a case of conacre; the party letting the grazing or in conacre was held not disqualified.

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The question arising here is, Does separate occupation mean exclusive use? A county road running through a large farm cannot kill the franchise. If a rated occupier dedicated such a road to the public, that would not destroy his right to the franchise. How much less the right to pass over, if so inclined, a square foot of ground in the use of a passage which, as the Revising Barrister found, could be dispensed with, as the party upstairs had other modes of access to front and rear: *De minimis non curat lex*.

Again, the statement of the qualification and the description of the qualifying premises excludes the principle of *M'Bride v. Bryans* (4). *Coyle v. Mahon* (5) merely follows *M'Bride v. Bryans* (4).

The 5th section of the Act of 1871 (41 & 42 Vict. c. 26) is explained by Lord Justice Fitz Gibbon in *Hasson v. Chambers* (6). "Use" in the section means occupation.

The Right Hon. J. H. Campbell, K.C., and D. S. Henry, K.C.
(with them *Osborne*), for the respondents.

Any construction of the 5th section of the Act of 1871 other than that adopted in *M'Bride v. Bryans* (4) would violate the language of the statute. Prior to the Act of 1871 there was a considerable conflict of judicial opinion on the effect of the 3rd section of the Act of 1867, particularly as to the joint use of some other part of the premises, *e.g.*, a staircase used in common. Section 5 was directed at this controversy, and closed it. A vote may be claimed out of part of what is ordinarily called a dwelling-house, though there may be joint occupation of other parts. But

(1) 37 Ir. L. T. R. 20.

(2) *Laws* (1885-1893), p. 211.

(3) *Ibid.* 209.

(4) [1908] 2 I. R. 329.

(5) [1908] 2 Ir. 622.

(6) 18 L. R. I. 68, p. 81.

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there must be sole and exclusive occupation of the qualifying part : *Bradley v. Baylis* (1) ; *Morfee v. Novis* (2) : see *per* Denman, J., p. 207, where he points out the distinction between exclusive use and exclusive occupation, illustrating such by the case of a visitor at a hotel. We admit that incorporeal rights do not affect occupation in the legal sense. But here the statute says the claimant, in order to succeed, must have sole and exclusive occupation. In *Torish v. Love* (3) there was no necessity for resort to section 5 of the Act of 1871, for the claimant was in occupation of the whole house as owner or tenant. But when part only of a house is occupied, no claim can be put forward, except under section 5, and that claim must be founded on sole and exclusive use. [Counsel referred to *Cook v. Humber* (4) ; *Thompson v. Ward* (5) ; *Boon v. Howard* (6), and *Barnett v. Hickmott* (7).]

Sullivan, K.C., in reply:—

Torish v. Love (3) is a conclusive decision that the existence of an incorporeal right over the qualifying premises did not disfranchise a person who otherwise would be entitled as an inhabitant householder. Use means occupation, and nothing but occupation. [Counsel referred to *Thompson v. Ward* (5) ; *Bradley v. Baylis* (1) ; *Morfee v. Novis* (2).] The Act of 1878 only changed the subject-matter of the qualification, but not its nature.

LORD O'BRIEN, L.C.J. :—

The re-argument of this case was directed for one object, and one object only, namely, to reconsider the decision in *M'Bride v. Bryans* (8). We were of opinion that the attempted distinction in the description of the premises in this case and that of *M'Bride v. Bryans* (8) was wholly unsubstantial—indeed, whimsical ; and we accordingly ordered the re-argument to take place in order to have the decision in *M'Bride v. Bryans* (8) reconsidered. The

(1) 8 Q. B. D. 195.

(2) *Ibid.* 200.

(3) [1894] 2 I. R. 372.

(4) 11 C. B. (N. S.) 33.

(5) L. R. 6 C. P. 327.

(6) L. R. 9 C. P. 277.

(7) [1895] 1 Q. B. 694.

(8) [1908] 2 I. R. 329.

case has been fully argued, and we are satisfied that *M'Bride v. Bryans* (1) was rightly decided, and we accordingly affirm it. Though I expressed my view in *M'Bride v. Bryans* (1), I may be permitted to put in a narrow compass the ground of my decision. The statute which creates the particular franchise with which we are dealing (41 & 42 Vict. c. 26), in its 5th section uses the words "sole and exclusive use"—"when the occupier is entitled to the sole and exclusive use." Now I am of opinion that these words mean either a special occupation which includes *exclusive* use, or an occupation within the meaning of that term under earlier statutes or at common law, *plus* exclusive use; but however that may be, the particular franchise rests upon separate occupation, and under the words of the 5th section exclusive use is an essential element of separate occupation, and as there is no exclusive use here, the present claim fails. We must give some effect to the words "*exclusive* use." Mr. Healy and Mr. Sullivan gave no effect to these words. The history of the legislation, I think, supports the view I have taken; but I rest my judgment upon the actual words of the statute.

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Lord O'Brien,
L.C.J.

THE MASTER OF THE ROLLS:—

The qualification of John Steele was claimed in a way which was supposed to meet the observations of Lord Justice Holmes in *M'Bride v. Bryans* (1). The Lord Justice said (p. 334), "It is possible that she may have had a qualification other or different from this; but I must accept the finding of the Revising Barrister, and I am not at liberty to amend or alter it."

It is plain that it occurred to some astute adviser of the appellant that by the insertion of the words, "so much of a kitchen as is not occupied by a right of way passing in a straight line from the door communicating between a common hall and the said kitchen and a common yard," the claimant might possibly evade the decision in *M'Bride v. Bryans* (1). But, as the Lord Chief Justice has said, this Court is concerned on this argument only with the question whether the principle laid down in *M'Bride v. Bryans* (1) was right or not; and, speaking for myself,

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I can hardly conceive how anyone could for a moment have imagined that by such a flimsy device the true principle of *M'Bride v. Bryans* (1) could be evaded. As a matter of fact the Revising Barrister finds that the facts of this case are identical with those in *Coyle v. Mahon* (2), although he finds also as a fact that the words in the claim describe the qualification accurately.

I have merely to express my view as to whether the decision of the majority of the Court in *M'Bride v. Bryans* (1) was right or not. I entertain no doubt it was absolutely correct. In this case we must come back to the statute. I took the liberty of saying during the argument that it is a new charter in itself, and to understand the provisions of that charter you must have regard to the words used by the Legislature. It is better to adhere to the plain words of a statute than to depart from them on any grounds of inconvenience. Suggestions have been made as to the absurdities which may result from adhering to the strict construction of this statute. I attach no weight to such suggestions. This Court has never hesitated to adhere to the plain words of a statute whatever the consequences. Over and over again, for example, in cases under the Irish Land Acts, this Court has held that the only safe way of proceeding under a statute is to construe it according to the actual meaning of the words used. No one laid that doctrine down more clearly than Lord Justice Fitz Gibbon. In *Beamish v. Crowley* (3) he said, "We cannot mitigate the stringency nor refine away the requirements of the Act; and in my judgment, we cannot make it a question of degree whether the tenant is in any given case within or without the statute. If he fulfils its conditions, he is entitled to its benefits; if he does not, the Court cannot, on any sort of *cy près* system, give him rights which the Legislature has denied him."

I concur in that judicial pronouncement, which is eminently applicable to the present case; and it seems to me that it makes no matter whether the objection to the voter's claim is in respect of a right of way over a square yard, or across a kitchen

(1) [1908] 2 Ir. 329. (2) [1908] 2 Ir. 622. (3) 16 L. R. I. at p. 288.

to a common yard. The question is, What rights has the Legislature given to the claimant?—what rights has the Legislature denied him? I cannot state the law more clearly than it was stated in *M'Bride v. Bryans* (1) by the Lord Chief Justice and Lord Justice Holmes. Their judgments run on identical lines. It is only necessary to refer to one passage in the judgment of the Lord Chief Justice:—"She has not the sole and exclusive use of the whole of the tenement. She has not the sole and exclusive use of the kitchen. The tenant of the upper story has a right to go through this kitchen at all times during the day and night—a most burdensome right. I know no right that in any case would be more burdensome and offensive." I take the liberty of saying that I absolutely agree in that. Nothing would be more calculated to disturb sole and exclusive use than this right to pass through the kitchen (which is part and parcel of the qualifying premises) at all times of the day or night.

Lord Justice Holmes answered in advance many of the arguments which were addressed to us. He never suggested that, at Common Law, the enjoyment of a right of way over premises deprived the occupier of the servient tenement of the possession of any part of it. "But," he added, "I have to determine the meaning of separate occupation in the section mentioned; and taking its language as a whole, I can give it no other meaning than that it relates to such an occupation as carries with it the right to exclusive use."

To express in my own words the opinion I have formed during the course of the argument, I hold that in establishing on a firm and secure basis this *imperium in imperio*, this right to vote in respect of a dwelling-house within a dwelling-house, the Legislature enacted in express terms that the inner dwelling-house, whether consisting of one or more rooms, should be free from intrusion, should in fact be a house which the voter, gentle or simple, could call his very own.

PALLES, C.B. :—

The only inference which can be drawn from the facts stated is that the *entire* kitchen was in the occupation of the claimant,

(1) [1908] 2 Ir. 329.

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Appeal. subject to the right of way in the occupiers of the upper rooms.
 1909. Any other inference would exclude "that complete and secure
 STEELE privacy" which, according to *Barnett v. Hickmott* (1), is implied
 r. in the separate occupation of a dwelling-house. The question is,
 MAHON. Does such an occupation confer the franchise?
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Mr. Sullivan insists that *Love's Case* (2) decides that it does, and that *M'Bride v. Bryans* (3), a decision in 1907, which is said to be to the contrary effect, was decided *per incuriam*, *Love's Case* (2) not having been cited; and he asked us now to decide which of these decisions is for the future to be followed. I am of opinion that there is no inconsistency between them, and that both decisions are right.

The subject-matter out of which the franchise was claimed was different in each. In *Love's Case* (2) the qualifying premises were *inter alia* an entire house, the claimant's mother, a widow, having an incorporeal right to reside in it, and it was held that the claimant, the occupier, was entitled to be registered as sole occupier, notwithstanding the residence of his mother in the house under that incorporeal right.

The alleged qualifying premises in *M'Bride v. Bryans* (3) were, as they are here, *part* of a dwelling-house, and the question was, whether a right of passage through that part prevented it being separately occupied, and "a dwelling" within the meaning of 41 & 42 Vict. c. 26, s. 5.

Thus the question here is identical with that ruled in the latter case; and I now proceed to inquire whether in such a case the claimant is entitled to the franchise.

It is claimed under the 48 Vict. c. 3, ss. 5 and 7 (1), which was passed in 1884. Section 5 of that Act established a household qualification in every borough in Ireland, and section 7 (1) defined that "household qualification" as meaning the qualification enacted by section 3 of the Representation of the People Act, 1867, and the enactments amending or affecting the same; that section and those enactments being thereby extended, *inter alia*, to boroughs in Ireland.

(1) [1895] 1 Q. B. at p. 694.

(2) [1894] 2 Ir. R. 372.

(3) [1908] 2 Ir. R. 329.

By the 3rd section of the Act of 1867, thus extended to Ireland, the franchise is conferred on the inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; but no one was to be registered under that franchise by reason of his being a joint occupier of a dwelling-house. Then the 61st section of that Act defined "dwelling-house as including any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

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In several cases, of which *Thompson v. Ward* (1) and *Boon v. Howard* (2) are examples, the Judges of the Common Pleas Division in England were equally divided in opinion, and judicial interpretation of it became impossible.

In these circumstances the 41 & 42 Vict. c. 26 was passed, the object of section 5 of which was to solve the difficulty as to the construction of section 61 of the Act of 1867.

Its words, so far as they are material to the present case, are as follows:—"In and for the purposes of the Representation of the People Act, 1867, the term dwelling-house shall include any part of a house where that part is separately occupied as a dwelling. For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the *sole and exclusive use of any part* of a house, *that part* shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some *other part*."

As *inclusio unius est exclusio alterius*, the above enactment involves the correlative proposition that part of a house, of which part the occupier is not entitled to the sole and exclusive use, shall not be deemed to be occupied separately; or, at all events, there is no enactment that it shall be so deemed; and deeming it to be so would be, as I have already said, inconsistent with *Barnett v. Hickmott* (3).

The enactment then proceeds that the interpretation of dwelling-house contained in this section shall be substituted for that contained in section 61 of the Act of 1867. The effect of this Act is that if a claimant had the sole and exclusive use of an

(1) L. R. 6 C. P. 327.

(2) L. R. 9 C. P. 277.

(3) [1895] 1 Q. B. 694.

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upper room it was to be deemed that he occupied separately, although he was also entitled, as part of his dwelling, to the joint use of the staircase. In this respect the Act adopted the construction which in *Thompson v. Ward* (1) had been put upon the section by Bovill, C.J., and Keating, J., contrary to the opinion of Willes and Brett, JJ.

Let me now apply these enactments to the facts of the present case. The claimant cannot have the franchise under the Act of 1867 alone, without the assistance afforded by 41 & 42 Vict. c. 26, section 5, because section 61 of the Act of 1867 has been repealed, and the qualifying premises are not a house, but part only of a house. He must therefore claim through the later Act.

Now, the premises which constitute his "dwelling-house" consist of the two rooms upstairs, the kitchen, and the right to use the staircase. If the passage did not pass through his kitchen, he would have been entitled to the franchise, although he was in addition entitled, as part of his dwelling-house, to the joint use of the staircase. But as the passage passes through his kitchen, he is not entitled to the sole and exclusive use of the kitchen; and, as the kitchen is part of the "dwelling," the dwelling is not separately occupied.

If the franchise be claimed in respect of the two upper rooms alone, he cannot succeed, as they do not constitute his entire dwelling. If it is claimed out of the two rooms and the kitchen, that dwelling is not separately occupied. The entire of it is not in his sole and exclusive use; part of it being subject to the use of the occupiers of the other upper rooms in exercise of their right of passage. In my opinion the decision of the Revising Barrister was right.

HOLMES, L.J. :—

The object of having this case re-argued before the full Court was, that we might have an opportunity of reconsidering *M'Bride v. Bryans* (1), decided in this Court in 1907, and which it is impossible to distinguish. There was an attempt made to show that the qualifying premises as described were different from those

in *M'Bride v. Bryans* (1); but we must hold that in both cases the dwelling-house of the voter consisted of two rooms *plus* the kitchen, with a right of way across the latter vested in another person.

I naturally turn to *M'Bride v. Bryans* (1). It was heard at considerable length; the Judges reserved judgment, and I carefully considered the case. The result was that the majority of the Court held, on the terms of section 5, that the claimant was not entitled to the franchise. I came to that conclusion on the ground that the kitchen formed part of the dwelling, and it was not used exclusively by the claimant. We thought ourselves conclusively bound by *M'Bride v. Bryans* (1) when a similar question arose in 1908 (*Coyle v. Mahon* (2)), and we decided accordingly.

However, some additional authorities were cited during the argument in the present case. The result of my reconsideration has been to strengthen the view I took before. I know now, understanding more clearly the history of the legislation, that section 5 of the Act of 1878 (41 & 42 Vict. c. 26) was passed to take the place of the interpretation of "dwelling-house" in section 61 of the Act of 1867 (30 & 31 Vict. c. 102), and that the old definition was swept away, section 5 being substituted therefor. Finding that this is so—that the new piece of legislation was passed to get rid of the old and unsatisfactory legislation—I am helped in considering whether my former judgment was right, and I am led to adhere to the words I then used, with the result that I am satisfied that this appeal should be dismissed.

(1) [1908] 2 Ir. 329.

(2) [1908] 2 Ir. 622.

Solicitor for the appellant: *Tracy*.

Solicitor for the respondents: *Caldwell*.

W G.

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Holmes, L.J.

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BYRNE, APPELLANT; ROGERS, RESPONDENT (1).

1910.

Jan. 17, 18, *Dentist—Unregistered person—Description implying specially qualified to practise dentistry—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.*
30.

The Dentists Act, 1878, provides that a person shall not be entitled to take or use any name, title, addition, or description implying that he is a person "specially qualified to practise dentistry," unless he is registered under the Act.

Held, that the words "specially qualified" refer to a qualification in the nature of a degree, diploma, &c., and do not include the case of a description implying mere personal skill or accomplishment.

Barnes v. Brown, [1909] 1 K. B. 38, not followed.

TWO CASES STATED under 20 & 21 Vict. c. 43, by Mr. Mahony, a Divisional Justice of the Dublin Metropolitan Police District.

The facts as appearing from the first case were as follows:—

The respondent, the Hon. Secretary of the Irish Branch of the British Dental Association, was complainant in a summons issued against the appellant as defendant. The summons charged that the defendant did, on the 2nd April, 1909, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully take or use a certain title, addition, or description, namely:—"Consult Mr. Byrne, 'the world's expert adapter of teeth'; he tenders you original advice on the treatment acquired through his vast experience of twenty-five years abroad; decayed teeth infallibly treated by nature's own remedy; shattered health restored; all patrons delighted; consultations free; hours 9 till 7. Metropolitan address: 36 Talbot Street. N.B.—Letter appointments specially attended to." And also: "Are you wanting artificial teeth or a mis-fitting case re-made? Then come to me. I guarantee my work for life. Instalments taken. Fittings with gold or any of the 15 amalgams, all one fee, 2s. 6d. Extractions (by my great secret method) without gas, cocaine, or other drugs, one fee only,

(1) Before LORD O'BRIEN, L.C.J., and WRIGHT and DODD, JJ.

1s. Mr. Byrne, 36 Talbot Street"—implying that said defendant was a person specially qualified to practise dentistry, contrary to the form of the statute in such case made and provided.

The charge was heard before Mr. Mahony. Evidence was given of the publication by the defendant in the *Dublin Evening Mail* of an advertisement in the terms set out in the summons. A Mr. Giltrap deposed as follows:—"I remember the 25th April last. I went to the defendant's premises, 36 Talbot Street. Outside his premises is a glass case bearing printed words, and on his street door are other printed words. They read: 'Mr. Byrne, the world's expert adapter of teeth. Extraction 1s., by my own special system. Painless and bloodless. Attendance 9 till 7.' I went upstairs, where there was a young lady waiting. I was shown into Mr. Byrne's consulting-room, which contained the usual appliances of a dentist. I asked defendant if he was Mr. Byrne, 'the dentist.' He said he was, and asked what he could do for me. I got him to examine my mouth and came away. I see the man in Court who stated he was Mr. Byrne, the dentist."

Mr. Mahony found as a fact that the defendant was not registered under the Dentists Act, nor was he a legally qualified medical practitioner. He also found that the defendant had inserted the said advertisement, and that he operated, and held himself out as a person specially qualified to practise dentistry, and convicted him and fined him £5 and £1 10s. costs; but on his application stated the present case, requiring the judgment of the Court as to whether this determination was correct in law.

The second case dealt with a summons in which the description charged to have been used by the defendant was that given above as printed on the glass case and street door. On this summons Mr. Mahony also convicted the defendant, finding as a fact that he purported to operate and practise, and did practise as a person specially qualified to practise dentistry, and that he took and used the title or description "Dentist."

Alfred Coffey (with him *S. L. Brown, K.C.*), for the appellant:—

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Respondent.

The question is, what is the meaning of the words "specially

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qualified" in section 3 of the Dentists Act, 1878? We submit that these words must be confined to a description implying that the person is possessed of a qualification which would entitle him to be registered under the Act, and do not cover a case like the present, where nothing more is alleged than competence arising from skill and experience. It may be contended that *Barnes v. Brown* (1) is opposed to this view, but that case must be taken to be overruled by *Bellerby v. Heyworth* (2). [He also referred to *Emslie v. Paterson* (3).]

De Renzy, and *Samuels*, K.C., for the respondent:—

The meaning of the words "specially qualified" in section 3 of the Act cannot be limited as suggested in the argument for the appellant. These words include a description, such as here, implying that the person has special qualifications arising from skill and practice: *Barnes v. Brown* (1). That case, as regards the principle so laid down, is not overruled by *Bellerby v. Heyworth* (2). All the latter case decides is, that the description prohibited by section 3 is a description of the person, as distinguished from a description of the acts done by the person. The Master of the Rolls said (p. 28) that it was not necessary to express an opinion as to the precise effect to be given to the words "specially qualified" in section 3, as in his view that matter did not arise for decision. Buckley, L.J., said (p. 30) that it was not necessary for the purpose of the case to decide whether persons specially qualified, as mentioned in section 3, must necessarily be persons falling within section 6, and adds, "As at present advised, I think not." Later on he puts as an instance of a case the section might cover—"Suppose a man used words representing that by reason of long experience he did the act exceptionally well, it may be that would be a description of himself as a person who was qualified in a particular way." In *Royal College of Veterinary Surgeons v. Robinson* (4), decided under section 17 of the Veterinary Surgeons Act, 1881, a section practically identical in terms with sect. 3 of the Dentists Act, except that it deals with veterinary

(1) [1909] 1 K. B. 38.

(2) [1909] 2 Ch. 23.

(3) 24 R. (Just. Cas.) 77.

(4) [1892] 1 Q. B. 557.

surgeons, and not with dentists, the defendant described his premises as a "Veterinary Forge," and it was held that this amounted to a description that he was specially qualified to practise a branch of Veterinary Surgery, and came within the section. In *Royal College of Veterinary Surgeons v. Collinson* (1), also decided under the same section of the Veterinary Surgeons Act, 1881, the words "Canine specialist. Dogs and cats treated for all diseases," were held to constitute a description within the section. In *Panhaus v. Brown* (2), a decision under the present section, it was held that the title "German Dental Institute" was a description implying that the person was specially qualified. In that case the advertisement, published by the appellant, as to the nature and quality of the work done by him, was of a very similar nature to that in the present case, and Lord Alverstone, C.J., in giving judgment, says that the appellant, in his advertisement, "gives a number of descriptions which, if they applied to an individual, would unquestionably be sufficient to imply that he was a person specially qualified to practise dentistry." Section 4 of the Dentists Act, 1881, makes it an offence for a person to take or use the designation of any "qualification or certificate" in relation to dentistry which he does not possess. This provision cannot be intended to cover the whole ground already covered by section 3; and section 3 must therefore have a wider operation and include a description not necessarily limited to the designation of a qualification or certificate. Each of these two sections states its own offence, provides its own mode of prosecution, and imposes its own penalty. [They also referred to *The King (Rowell) v. Registrar Joint Stock Companies* (3); *Attorney-General v. Appleton* (4).]

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Brown, K.C., in reply :—

The Dentists Act, 1878, did not make the practice of dentistry by unregistered persons illegal. The object of the Act, as shown by the preamble, is to provide for the registration of persons "specially qualified" to practise as dentists. The classes of

(1) [1908] 2 K. B. 248.

(2) 68 J. P. 435.

(3) [1904] 2 I. R. 634.

(4) [1907] 1 I. R. 252.

K. B. Div. persons so specially qualified are set out in section 6. The words
 1910. "specially qualified" must be given in section 3 the same mean-
BYRNE, ing as in the preamble; and, accordingly, to bring a person within
Appellant; section 3, the description must be one implying that he is possessed
ROGERS, of one or other of the qualifications mentioned in section 6.
Respondent. *Barnes v. Brown* (1) was wrongly decided. It must be taken
 to have been over-ruled by *Bellerby v. Heyworth* (2). In the latter
 case the Master of the Rolls begins his judgment by saying that
 it is in reality an appeal from the decision of the Divisional Court
 in *Barnes v. Brown* (1). The decision in *Bellerby v. Heyworth* (2)
 establishes this: that a man, although not registered, may adver-
 tise that he does dentists' work, and that he does it well. It must
 follow that he can also state his qualifications for doing such work
 well, such as his long experience, or some special method of his
 own. Although section 17 of the Veterinary Surgeons Act, under
 which the cases of *Royal College of Veterinary Surgeons v. Robin-*
son (3) and *Royal College of Veterinary Surgeons v. Collinson* (4)
 were decided, is analogous in its terms to section 3 of the Dentists
 Act, 1878, yet the objects of the two Acts are different, as appears
 from the respective preambles. The object of the Veterinary
 Surgeons Act is the protection of the public; the object of the
 Dentists Act is the protection of dentists. Moreover, *Robinson's*
Case (3) was doubted by all the Judges who decided *Collinson's*
Case (4).

Jan. 30.

LORD O'BRIEN, L.C.J. :—

This case is difficult in itself, and is rendered still more diffi-
 cult on account of the case of *Barnes v. Brown* (1), a decision of
 a very eminent Court in England, presided over by the Lord
 Chief Justice of England. The question we have to determine is
 as to the meaning of three words, "person specially qualified," or,
 perhaps, I should say two words, "specially qualified," occurring
 in section 3 of the Dentists Act, 1878; upon their true construc-
 tion the decision in this case depends. Before I read that section,

(1) [1909] 1 K. B. 38.

(3) [1892] 1 Q. B. 557.

(2) [1809] 2 Ch. 23.

(4) [1908] 2 K. B. 248.

I shall read the preamble to the Act. It is as follows:— K. B. Div.
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 “Whereas it is expedient that provision be made for the registration of persons *specially qualified* to practise as dentists in the United Kingdom, and that the law relating to persons practising as dentists be otherwise amended.” I emphasize the words “specially qualified.” What do these words mean? Do they mean specially qualified by statutory warrant, by licence, diploma, degree, or hall-mark, so to speak, and do they refer to persons so qualified alone; or do they include persons specially competent to practise dentistry independent of a diploma or degree? I think that in common parlance, if you were to say that a person was specially qualified, you would imply that he had a qualification by diploma, licence, or degree. I think that *prima facie* the words have that meaning.

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Lord Alverstone and the other distinguished Judge who decided *Barnes v. Brown* (1) were of opinion that the words “specially qualified” include persons qualified by accomplishments—by personal skill—as distinguished from qualification outside the person, such as by diploma, degree, or other hall-mark. That was the basis of the decision in *Barnes v. Brown* (1).

It was not contended in this case that in the advertisements which the defendant published he claimed to have any qualification dependent on diploma, degree, or hall-mark, or any of the qualifications referred to in the 6th section of the Act; but it was argued that he did claim that he was specially qualified by reason of study, practice, and training, and that that was enough to make him amenable to the section. After the most careful consideration we have come to the conclusion that the words “specially qualified” in sect. 3 of the Dentists Act, 1878, mean qualified by diploma, licence, degree, or hall-mark, and do not include person qualified by mere personal skill, practice, or training; that “qualification” is something external to the person—a degree or diploma external to the practitioner—and does not include mere personal skill or accomplishment.

Section 4 is an important section, having regard to sub-

(1) [1909] 1 K. B. 38.

K. B. Div. section 1 (a), and more especially to sub-section 2. The former 1910. uses the words "holds a qualification." This is plainly indicative of some sort of hall-mark; and sub-section 2 provides that: "A prosecution for such an offence shall be instituted only as hereinafter mentioned. If a person takes or uses the *designation of any qualification or certificate* in relation to dentistry or dental surgery which he does not possess, he shall be liable, on summary conviction on such prosecution as hereinafter mentioned, to a fine not exceeding twenty pounds." "*A prosecution for such offence shall be instituted only*"; do not these words show that the condition necessary to prosecution is, that the person shall take or use a *designation or certificate*? This plainly is conversant with something external to the man himself—a hall-mark, diploma, a licence; and affords an illustration of what is meant by the words "specially qualified" in section 3.

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It would appear to me that "qualification" is used throughout this Act of Parliament as meaning a qualification external to the practitioner—something different from mere personal competency, mere personal skill or accomplishment; that it means a qualification by hall-mark, diploma, or degree. This is the more apparent, having regard to the 7th and 11th sections. Section 7 commences as follows:—"Where a person entitled to be registered under this Act produces or sends to the general Registrar the document conferring or evidencing his licence or qualification. . . ." *The document*—This shows that the qualification is something altogether distinct from mere personal skill or competency, something outside the man himself. The same view is borne out by section 11, which provides for the form of the dentists' register, and contains other provisions as to registry: see especially sub-section 2.

Looking, therefore, at the entire Act of Parliament, I think that the words "specially qualified" in section 3 should be confined to qualification by licence, degree, or diploma, or, so to speak, hall-mark—some analogous qualification—and do not include mere personal accomplishment as distinct from such qualification.

Now, if this were merely a civil case, I think we should be justified in saying we will follow *Barnes v. Brown* (1). But this

(1) [1909] 1 K.B. 38.

is not a civil case ; it is conversant with the imposition of a penalty ; and before we impose a penalty we should be satisfied that we have statutory warrant to do so. In my opinion there is no such statutory warrant. The judgment of Cozens-Hardy, M.R., in *Bellerby v. Heyworth* (1) was a practical dissent from the decision in *Barnes v. Brown* (2). In *Bellerby v. Heyworth* (1) the Master of the Rolls says that the Act was passed for "the protection of dentists"; and towards the end of his judgment he says:—"I have thus far refrained from criticizing or commenting upon the judgment in *Barnes v. Brown* (2). It is needless to say that I have considered what was said by the Lord Chief Justice and Bigham, J., in that case with the utmost respect, but I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do, and do well, that which the law entitles them to do, they are necessarily infringing the Act. I can find no such personal description, either expressed or implied, in what has been done here as brings the case within the section. Therefore, with great deference to the Divisional Court, I prefer the view taken by the Scottish Court, and I think that that decision ought to be followed in preference to *Barnes v. Brown*" (2). This passage shows, I think, that, in the opinion of the Master of the Rolls in England, the decision in *Barnes v. Brown* (2) was wrong.

Upon the whole case, having regard to the language and object of the Act of Parliament itself, and to the judgment of the Master of the Rolls in *Bellerby v. Heyworth* (1), with which I think Lord Justice Kennedy substantially concurred, Lord Justice Buckley not expressly dissenting from the view of the Master of the Rolls, I am of opinion that we ought to declare that the appellant did not commit an offence within the meaning of the Dentists Act, 1878.

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(1) [1909] 2 Ch. 23.

(2) [1909] 1 K. B. 38.

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WRIGHT, J. :—

The question involved in these two cases, namely, the construction to be put upon the words “specially qualified” in section 3 of the Dentists Act, 1878, as amended by section 26 of the Medical Act, 1886, has been decided by the English Court of King’s Bench in *Barnes v. Brown* (1); and in accordance with that decision the magistrate has in each summons convicted the defendant, and at his request has stated a case for the opinion of this Court.

If this decision of the English Court of King’s Bench stood alone, it would be desirable to follow it, so as to secure uniformity of construction of a statute applying to the United Kingdom. But that decision has been criticized in a later case decided by the English Court of Appeal: *Bellerby v. Heyworth* (2); and while the decision there turned on a different question, namely, a question of fact, it is clear that there was not unanimity of opinion among the Judges who constituted the Court as to the meaning of the words “specially qualified.” Buckley, L.J., inclines to the view of the King’s Bench in *Barnes v. Brown* (1); Kennedy, L.J., inclines to the opposite view, that contended for by the appellant here; and the Master of the Rolls refrains from expressing an opinion as to the precise effect to be given to them. In an earlier Scotch case *Emslie v. Paterson* (3) the judgments of the several members of the Court, as I read them, rather tend in the direction of the opinion of Kennedy, L.J., as to the construction of these words; but the decision of the Court was rested upon a question of fact.

In this state of previous decisions, I consider that I am bound to form and express my own opinion, more particularly as the question is of great general importance, affecting a very large class.

What is the meaning in section 3 of the Act 41 & 42 Vict. c. 33, of the words “specially qualified”? In considering this,

(1) [1909] 1 K. B. 38.

(2) [1909] 2 Ch. 23.

(3) 24 R. (Just. Cas.) 77.

assistance may be derived from the preamble of the Act, and from section 3, section 4 (1) and (2), section 6, section 7, and section 11 (2).

The Act was passed for the protection of dentists, and established a register of dentists. The preamble recites that it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom. In section 3, where the words "specially qualified" are used, they immediately follow words denoting that the person styles himself a registered dentist or dental practitioner, and presumably refer to a qualification of the same kind as the preceding words. Section 4 (1) covers the whole ground dealt with by section 3, and, in particular, section 4 (1) (a) protects from liability to prosecution and a fine a person who holds a *qualification* which entitles him to practise dentistry or dental surgery in a British possession or foreign country, and did not represent himself to be registered under that Act. Section 4 (2) renders a person taking or using the designation of any *qualification* or certificate in relation to dentistry or dental surgery which he does not possess liable to a prosecution and fine not exceeding £20. It seems to me to be impossible under this section to say that qualification and certificate are not of the same class, or to hold that qualification means, or includes, qualities such as personal skill or fitness, which a person asserts that he has acquired by long practice.

Section 6 enumerates the several classes of persons entitled to be registered under the Act, and the persons falling within any one of the specified classes would be persons "specially qualified" within the language of the preamble. Section 7 provides that a person entitled to be registered and desiring to be registered is to produce or send to the general Registrar the document conferring or evidencing his licence or *qualification*. Under section 11 (2) the register which is to be kept, and which is to be called the Dentists' Register, is to contain, *inter alia*, the description and date of the *qualifications* in respect of which they (the dentists) are registered.

It seems almost superfluous to point out, what has been

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K. B. Div. pointed out in so many of the reported cases, that any man
 1910. may draw teeth and practise dentistry generally, and may tell
 BYRNE, the public so, and may say, in the language of the English
Appellant; Master of the Rolls in *Bellerby v. Heyworth* (1), that he does
 ROGERS, the work well. The Act of 1878 never took away the right in
Respondent. anyone to do dental work in all its branches. The right to do
 Wright, J. such work exists now as it always did. The Act of 1878 gave
 a certain *status* and recognition to registered dentists, and drew a
 sharp distinction between that class and unregistered practitioners,
 and subjected to penalties any one of the latter class in any way
 holding himself out to the public under a title or description which
 would imply that he was one, or entitled to become one, of the
 former class.

Having regard to the law before 1878, and since, to the general
 object of the Act of 1878, and the language of the several sections
 which I have examined, I am of opinion that "special qualification"
 means something in the nature of a diploma or degree conferred
 by a recognized public body capable of conferring it, something
 outside the personal qualities of the individual, which would entitle,
 or go towards entitling, the person who had it to be registered as
 a dentist.

I now turn to the advertisement or advertisements inserted by
 the defendant. In one of them he calls himself "the world's
 expert adapter of teeth"; he tenders you "original advice on the
 treatment, acquired through his vast experience of twenty-five
 years abroad." In the other he says, "I guarantee my work for
 life . . . Extractions (by my great secret method), without gas,"
 &c. Taking these two advertisements in their entirety, I read
 them, as I think the ordinary man would read them, as an in-
 flated advertisement by the defendant of his great skill and long
 experience, and as an inducement to members of the public to
 consult him at a very low fee in preference to the registered, more
 expensive, and less efficient dentist. But they would never convey
 to my mind, nor I believe to the mind of the average man reading
 them, that he (the defendant) had ever attended a lecture, ever
 entered a college where dentistry is taught, lectures are given,

(1) [1909] 2 Ch. p. 29.

examinations held, and diplomas conferred; still less would they convey that he had a degree of any university, college, or public institution. I am of opinion that the decision of the magistrate was wrong, and that the summonses ought to be dismissed.

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Dodd, J. :—

The statute is a difficult one to construe. It prohibits words; it does not prohibit acts. A man may without offence extract teeth, and put in false teeth. He may do everything that a dentist does. He may practise dentistry. But he may not call himself a dentist, or take or use a "description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under the Act."

The question in this case is—Has the defendant taken or used a description implying that he is specially qualified? The words complained of are found in an advertisement lauding the work done. Lauding work is not an offence, unless it comes under the word "description," and description means description of a person. The advertisement challenged has the words—"the world's expert adapter of teeth." These words are said to be a description of Mr. Byrne, implying that he is "specially qualified." Are they? If one were to put the question to an intelligent man, not a lawyer, he would reply—that depends upon what you mean by the word "qualified." If it means competent, the words do imply that the advertiser is specially *competent*. If it means that he possesses a qualification derived from some external authority, collegiate, medical, or surgical, the words do not imply that the advertiser has such qualification. Between the time at which this case was argued and the day for decision, it so happened I was sitting as a Judge at Nisi Prius, in cases in which medical gentlemen were witnesses. And I was struck with the way in which the examination began. The counsel says to witness, "You are a fully qualified surgeon? Answer, "Yes." Counsel proceeds, "Please state your qualification." Counsel, after one of the witnesses had enumerated a long list of degrees and diplomas,

K. B. Div. 1910. remarked to me, "Those are very special qualifications." The Lord Chief Justice, since the hearing, has drawn my attention to a section of the Act in which the word "qualification" is used in exactly this signification. The section was not alluded to in the argument, nor does it appear to have been alluded to in the authorities relied on in the argument. It is section 4. "If a person takes or uses the designation of any *qualification* or certificate in relation to dentistry or dental surgery which he does not possess, he shall be liable . . . to a fine not exceeding £20." I deal with the section not for the purpose of determining whether it makes a different offence from that laid down in section 3; I approach it for the purpose merely of seeing what the word "qualification" means when used in the Act. That section regards the *qualification* as something conferred by an outside authority, which a person may possess, as he possesses a certificate. The marginal note to section 6 is "Qualification necessary for registration." Here again the word means the same thing. The noun "qualification" as used in this section would seem therefore to refer to a qualification conferred upon a person. It is true it includes a qualification conferred on those who were actually engaged in the practice of dentistry at the time of the passing of the Act, that is a qualification conferred by the statute. Again, in section 7 we find the words "license" or "qualification." If the noun is restricted to this meaning, can the adjective "qualified" have a different meaning? The adjective is not so used in the preamble. It is not so used in section 5, which has the phrase a "legally *qualified* medical practitioner." Note specially the words in this section, 5, "unless he is registered under this Act or is a legally qualified medical practitioner." Is it to get a wider meaning in the section creating an offence? and that too where the word "specially" is prefixed to it? There is force, I think, in the contention that "specially" is introduced to distinguish a qualification obtained by examination from such a qualification as is conferred by the statute on those then *bonâ fide* engaged in the practice of dentistry at the time of the passing of the Act.

I have endeavoured to approach the consideration of this matter without assistance from reported cases, and without

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precisely defining what the words do include, it is enough for me to say that they do not include a statement that the person who seeks to do the work is a *competent* person to do it, by reason of his own experience. The collocation of the words strengthens this view. A person is not to call himself a dentist, or describe himself as specially qualified. The words that follow the "or" indicate something *ejusdem generis*. He must not say he is a dentist. He must not say he is professionally qualified.

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It remains to consider whether there is anything in the cases to modify this view, or anything in the comity of Courts to prevent it from being finally adopted in this Court.

That depends upon whether the judgment of the King's Bench Division in *Barnes v. Brown* (1) is binding upon this Court, having regard to the established rule of following decisions of the English Courts; or whether the subsequent decision in *Bellerby v. Heyworth* (2) has deprived it of its force. The Court of Appeal deliberately refrained from expressing an opinion as to the precise effect to be given to the words "specially qualified." The Master of the Rolls says:—"In my view that matter does not arise for decision" (p. 28). Lord Justice Buckley says (p. 30):—"It is not necessary for the purposes of this case to decide whether persons specially qualified, as mentioned in section 3, must necessarily be persons falling within section 6. As at present advised I think they need not. It would be very difficult to say that if a person put up a brass plate on his door—'Mr. A. B., a person specially qualified to practise dentistry, attends here daily to perform dental operations,' he would not fall within the Act of Parliament." I may, as to this last remark, say that the words used by the learned Lord Justice are the very words in the Act, and if a man uses the words prohibited, he could not be heard saying that when he describes himself as specially qualified he is not committing an offence. The offence is committed, just as if he had called himself a dentist. The words must have the same meaning as in the Act. The Lord Justice himself almost anticipates, without deciding, the point we have now to decide. He says later on:—"For instance, suppose a man uses words

(1) [1909] 1 K. B. 38.

(2) [1909] 2 Ch. p. 23.

K. B. Div. 1910. representing that by reason of long experience he did the work exceptionally well, it may be that would be a description of himself as a person who was qualified in a particular way.”
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Appellant : How he would decide that point he does not say. I rather infer
ROGERS, from “it may be” he was inclined to think it would not be an
Respondent. offence. Mark, he says in a “particular” way. He does not
Dodd, J. suggest that it would be a representation that he was specially qualified. Lord Justice Kennedy, leaning to an opposite view from Lord Justice Buckley as to whether section 3 was to be confined to the qualification in section 6, concurs in the opinion that it is unnecessary to decide that question.

Such being the attitude of the Court of Appeal, am I bound according to the comity of Courts to adopt the view of Lord Alverstone and Mr. Justice Bigham, who decided that the words have a wider meaning in section 3 than the qualification required by section 6? Those learned Judges adopted that view on reasoning that the Court of Appeal held to be erroneous. They took a wrong view of the Act. The Master of the Rolls says (p. 29) :—“I must confess that I am unable to follow the reasoning in that case—reasoning which seems to me to go the length of saying that people must not announce that they do that which by law they are entitled to do, and that by saying that they do, and do well, that which the law entitles them to do, they are necessarily infringing the Act.”

Now, it seems to me that a judgment as to the meaning of a word in an Act, which is based on a view of the Act that is held by the appellate Court to be erroneous, is not binding on me, and that the general view of the Act taken by the Court of Appeal is one that I must have regard to.

I follow it in its method also. I do not think it necessary to decide whether the special qualifications of section 3 are necessarily the qualifications of section 6. I do, however, decide the point that Lord Justice Buckley held was open for decision, and I decide it upon the view of the Act so clearly presented by the Master of the Rolls. I hold that the words used by the defendant in this case are words signifying that the only claim he has to custom is a claim founded on experience. He is entitled to say that he does the particular work which he advertises, that he does

it well, that he has twenty-five years' experience, and that his skill is founded on such experience. He calls himself "the world's expert adapter of teeth." I cannot hold that "expert" is used in the sense of a specialist, or that it implies any special qualification. I think the advertisement blatantly announces the very opposite—"I am not one of your professional dentists. I rely for my custom on competence merely, not on qualification." The rest of the advertisement shows that "expert" means a man relying on his experience only.

Dentists get considerable protection under the Act. Unregistered practitioners cannot use the name of dentist, and cannot sue for fees. But the Act does not make it an offence for an unregistered practitioner to advertise. The particular advertisement is eminently against all professional ideas of honour and dignity, but it is not a violation of the statute.

Solicitor for the appellant: *John Gore*.

Solicitors for the respondent: *W. G. Bradley & Sons*.

J. G. T.

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THE KING (THE CORPORATION OF DUBLIN)
v. FITZGIBBON (1).

Nov. 23, 24,
25, 26, 30;
Dec. 2.

Tramway—Construction of line authorized by statute—Consent of road authority—Refusal of—Grounds which will justify—Demand of way-leave rental—"Difference between Tramway Co. and road authority"—Settlement by referee appointed by Board of Trade—North Dublin Street Tramways Act, 1875 (38 & 39 Vict. c. cex), s. 16—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33.

Section 16 of the North Dublin Street Tramways Act (1875) (which is similar in terms to section 33 of the Tramways Act, 1870) contains the following enactment:—

"If any difference arises between the Company on the one hand, and the [road authority] on the other hand, with respect to any interference or control exercised or claimed to be exercised by them or on their behalf, or by the Company by virtue of this Act, in relation to any of the Company's tramways or works, or in relation to any work or proceeding of the [road authority] or with respect to the propriety of, or the mode of execution of, any work relating to any tramway, or with respect to the amount of compensation to be made by or to the Company, or on the question whether any work is such as ought reasonably to satisfy the [road authority], or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party."

This enactment is still in force as regards the rights, powers, and privileges of the Dublin United Tramways Company (1896), Limited, under the North Dublin Street Tramways Acts of 1875 and 1876 and the Dublin United Tramways (Electrical Power) Act, 1897, and applies to a dispute as to the terms upon which the consent of the Corporation of Dublin, as the "road authority," should be given to the construction of a tramway authorized by the said Acts. Such consent must be given or refused upon reasonable grounds; and the road authority has not an absolute right to withhold its consent for the purpose of exacting a way-leave rental arbitrarily fixed by itself.

R. v. Croydon and Norwood Tramway Co. (18 Q. B. D. 39) applied.

Quære, whether, in the absence of a special agreement recognized by statute the road authority has power to demand any way-leave rental for the use of a tram-line authorized by statute.

(1) Before ANDREWS, JOHNSON, and BOYD, JJ.

MOTION by the prosecutors, the Corporation of Dublin, to make absolute a conditional order that a writ of prohibition should issue to prohibit the respondent, G. Fitz Gibbon, K.C., from proceeding to hear and determine certain matters of difference between the prosecutors and the Dublin United Tramways Co. (1896), Limited, for the settlement of which the respondent had been nominated as referee by the Board of Trade in pursuance of section 16 of the North Dublin Street Tramways Act, 1875 (1). The facts and the arguments of counsel upon the questions decided by the Court are stated in the judgment of Andrews, J.

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THE KING
(DUB. CORP.)
v.
FITZ GIBBON.

Ignatius J. O'Brien, K.C. (Ronan, K.C., and P. O'C. White with him), for the Corporation of Dublin :—

Gordon, K.C., and T. M. Healy, K.C. (Serjeant O'Connor, K.C., and Collins with them), for the Dublin United Tramways Company (1896), Limited :—

Ronan, K.C., in reply.

ANDREWS, J. :—

Dec. 2.

This was an application by the prosecutors, the Corporation of Dublin, to make absolute a conditional order for a writ prohibiting Mr. Fitz Gibbon, the referee nominated by the Board of Trade under section 16 of the North Dublin Street Tramways Act 1875 (1), from proceeding to settle the matter in difference between the Dublin United Tramways Company and the Corporation of Dublin. The questions presented for our decision are substantially (1) whether this 16th section is still in force ; and, if so, (2) whether the matter in difference is within that section ; and (3) whether prohibition lies against the referee. These questions arise in the following manner. The Dublin United Tramways Company is an amalgamation of several companies of which the North Dublin Street Tramways Company was one. The latter company was incorporated by the North Dublin Street Tramways Act, 1875 (1), which contained section 16, providing for the settlement of any such difference as is therein mentioned

(1) 38 & 39 Vict. c. ccix.

K. B. Div. between that company and (amongst others) the road authority
 1909. (in the present case the Corporation of Dublin), by an engineer or
 THE KING other fit person nominated by the Board of Trade on the applica-
 (DUB. CORP.) tion of either party; and also contained section 69, empowering
 v. FITZGIBBON. the company, with the consent of the local authority and road
 Andrews, J. authority, from time to time to make, *inter alia*, such works, in
 addition to those particularly specified in and authorized by that
 Act, as they should find necessary or convenient for, *inter alia*,
 providing access to any carriage-houses or works of the company.
 The North Dublin Street Tramways Act, 1876 (1), empowered
 this company to construct certain additional tramways to those
 authorized by the Act of 1875 (2), one of which additional tram-
 ways was Tramway 2A, as defined by section 4 of the Act of
 1876. By section 2 of the Act of 1876 Parts II. and III. of
 the Tramways Act, 1870 (3), were incorporated. Section 33 in
 Part II. substantially corresponds with section 16 of the Act
 of 1875. The sections of the Act of 1875, specified in the
 schedule to this Act of 1876, were incorporated therewith.
 These included sections 16 and 69 of the Act of 1875; and
 the Act of 1876 thus contained by incorporation section 33
 of the Act of 1870 and section 16 of the Act of 1875,
 which are substantially the same. This double incorporation
 of substantially the same provisions would seem to have been an
 oversight in drafting; but it does not appear to affect any of the
 questions to be decided in this case. The Dublin United Tram-
 ways Company recently erected a new carriage-house or shed for
 the accommodation of their tramcars near the termination of the
 Tramway 2A, authorized by the Act of 1876; and in order to pro-
 vide access thereto for their tramcars from Tramway 2A, they
 proposed (in pursuance of their power under section 69 of the
 Act of 1875) (or rather under the substantial re-enactment
 thereof to which I shall afterwards refer, in section 61 of the
 Dublin United Tramways (Electrical Power) Act, 1897 (4), to
 make a short connecting line of tramway giving such access over
 a public road of which we must take it as admitted that the Cor-
 poration had become the road authority, and whose consent,

(1) 39 & 40 Vict. c. cccxxxiii.

(3) 33 & 34 Vict. c. 78.

(2) 38 & 39 Vict. c. ccix.

(4) 60 & 61 Vict. c. cccxxvi.

therefore, was required for making this short line, which I shall hereafter refer to as the shed-connexion line. The company accordingly applied to the Corporation for their approval of this line (see their secretary's letter to the Town Clerk, dated the 11th September, 1908), and the Corporation made it a condition to giving their consent to the making of the shed-connexion line that the Company should undertake and agree with the Corporation to pay way-leave rental in respect of the length of this line on the public road at the rate of £500 per mile (see their secretary's letter to the Company's secretary, dated the 23rd October, 1908), which the Company would not agree to pay (see their secretary's letter to the secretary of the Corporation, dated the 2nd November, 1908), and the Corporation then, referring to the letter of the 23rd October as their decision on the Company's application, wrote by their secretary to the Company's secretary on the 8th December, 1908, as follows:—"If your Company does not accept the conditions laid down, the Corporation's consent to the work will not be given." This was an absolute refusal by the Corporation to give their consent, except on the terms of the Company paying to them a way-leave rental fixed by the Corporation. A difference thus arose between the Company and the Corporation respecting the shed-connexion line which the Company was authorized to make with the consent of the Corporation; and whether this difference comes within section 16 of the Act of 1875 is a question with which I shall deal after determining the question whether section 16 is still in force. The Company, on the 16th February, 1909, made an application to the Board of Trade, setting forth the matters I have referred to, and submitting that the dispute which had so arisen between them and the Corporation was a dispute arising under section 16 of the Act of 1875, and requesting the Board to nominate an engineer or referee to decide it; and the Board of Trade, on the 21st August, 1909, nominated Gerald Fitz Gibbon, Esq., K.C., as referee to settle the matter in difference between the Dublin United Tramways Company and the Corporation. Upon the 10th September, 1909, the Corporation obtained a conditional order for a writ of prohibition prohibiting Mr. Fitz Gibbon from proceeding to settle the matter in difference between the Com-

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K. B. Div. pany and the Corporation, and the case has been argued before
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Now, as regards the question raised by the Corporation, whether section 16 of the Act of 1875 is still in force, it is necessary to refer first to the Dublin United Tramways Company Act, 1881 (1). This Act recited that, for the purpose (amongst others) of effecting an amalgamation of the three Companies therein mentioned (namely, the Dublin Tramways Company, the North Dublin Street Tramways Company, and the Dublin Central Tramways Company), the Dublin United Tramways Company, Limited, was incorporated and registered on the 24th of April, 1880. The Act of 1881, as appears thereby, was an Act to dissolve and re-incorporate the Dublin United Tramways Company, Limited, and to amalgamate therewith these three companies. The Acts of each of these three companies are recited in the Act of 1881, including the Acts of 1875 and 1876 relating to the North Dublin Street Tramways Company (in the Act of 1881 and hereinafter referred to as the North Dublin Company); and the Act of 1881 further recited that it would be convenient if the amalgamation of the said three companies was more effectually carried out, and those companies were dissolved; and that for that purpose it was expedient that the Dublin United Company should be dissolved and re-incorporated, and that *all the tramways, property, estates, rights, powers, and privileges* of the said three companies (including the powers of the North Dublin Company under their Act of 1880 (2) therein referred to) should be transferred to and vested in the re-incorporated Company, and the Act of 1881 then proceeded by its 4th section to dissolve the United Company, and re-incorporate it for the purpose of acquiring and maintaining and working the undertakings of the United Company and of the said three companies, and for exercising the powers and carrying on the business of those companies, and for other the purposes of that Act, under the name of the Dublin United Tramways Company. By section 23 of the Act of 1881 the said three companies were dissolved, and the property, estate, and effects,

(1) 44 & 45 Vict. c. cxl.

(2) 43 & 44 Vict. c. clxix.

rights, powers, and privileges vested in the said three companies, or in which they had any interest, or over which they were, or might be, enabled to exercise any power or control, whether with reference, *inter alia*, to the construction and maintenance of works or otherwise, were transferred to and vested in the re-incorporated company (now represented by the existing Dublin United Tramways Company); and the said three companies were to be deemed to be amalgamated with the re-incorporated Company as therein provided.

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If the case rested there, it would, in my opinion, be absolutely clear that the company to which the property of the amalgamated companies was transferred, was also invested with all the rights, powers, and privileges of the amalgamated companies under their respective Acts, including the rights and powers of the North Dublin Company under section 69 of the Act of 1875, with the consent of the local authority and the road authority, to make the shed-connexion line, and the right and privilege of that company, under section 16 of the same Act, to have any difference between them and the road authority in relation to that work settled by a referee nominated by the Board of Trade.

It has, however, been contended, on behalf of the Corporation, that the Tramway Company's rights, powers, and privileges, must be ascertained by reference to their Acts of 1897 (1) (hereinafter referred to), and that pre-existing rights, powers, and privileges which are not to be found in those Acts must be deemed to have been thereby repealed by implication, inasmuch as those Acts, as it has been contended, constituted a code governing the Tramway Company, outside which we cannot go in order to ascertain what the rights, powers, and privileges of the Company are; and as neither of those Acts in terms comprises section 16 of the Act of 1875, or similar provisions, the right to have any difference coming within the terms of that section settled by a referee nominated by the Board of Trade under that section has ceased to exist. In support of this contention it was pointed out that section 4 of the Company's Electrical Power Act, 1897, while

(1) *I.e.* 60 & 61 Vict. c. ccxxxv (New Lines) and 60 & 61 Vict. c. ccxxxvi (Electrical Power).

K. B. Div. incorporating other sections of the Act of 1870, omits, or, as it
 1909. was put in argument, excludes, section 33, similar to section 16
 THE KING of the Act of 1875, and that certain differences specially
 (DUB. CORP.) referred to in this Act of 1897 have special provision made
 v. for their settlement, such as, amongst others, differences coming
 FITZGIBBON. within section 46, with Gas and Water Companies, which are to be
 Andrews, J. settled by an arbitrator to be appointed by the Board of Trade at
 the request of either party; and differences coming within section 49 with the road authority in relation to the raising or lowering of road surfaces to the satisfaction of the engineer of the road authority, which are to be referred to an engineer mutually agreed upon, or, if they cannot agree, to an engineer appointed by the Board of Trade; and differences coming within section 50 with the Rathmines and Pembroke Main Drainage Board, in relation to the protection of the sewers and other works of the Drainage Board, which are to be determined by an engineer to be nominated by the Local Government Board; and it was further relied on that this Act of 1897, while omitting to enact or incorporate the provisions of section 33 of the Act of 1870, or section 16 of the Act of 1875, comprises in its 61st section the provisions of section 69 of the Act of 1875, with a modification.

Now, neither of the Acts of 1897 purports to be a code, nor with the other of them to constitute a code. The Electrical Power Act of 1897 was an Act to authorize the use of electrical power on the tramways of the Company, on which the use of it had not been authorized by previous Acts, so as to give a thorough system of electrical tramways, and avoid the inconvenience of working the tramways partly by electricity and partly by horse-power. There is nothing in the purpose or preamble of that Act to indicate any intention of codifying the previous Tramway Acts. Assuming that the differences, or some of them, the settlement of which is specially provided for by that Act, would have come within section 16 of the Act of 1875, that section may, to that extent, be qualified by these special provisions, but it cannot be regarded as repealed in relation to other differences not so provided for, as to which there is no inconsistency between section 16 and the special provisions referred to. The argument derived from

the inclusion in this Act of 1897 (1) of section 61, corresponding with section 69 of the Act of 1875, and the non-inclusion of section 16, or a corresponding section, is, in my opinion, answered by the fact that it was desired to modify section 69 in the manner in which it is modified by the proviso in section 61 in relation to objections by the owners and occupiers therein referred to, and to make it applicable to electrical tramways. The object of the other Act of 1897 (2)—the New Lines Act—was to empower the Tramway Company to construct certain new tramways therein described. There is nothing in its purpose or preamble to indicate any intention of codifying the previous Tramway Acts, and I can find nothing in it inconsistent with section 16 of the Act of 1875 remaining in force, subject to any qualifications which the Electrical Power Act, 1897, may be considered to have made in it. None of the special provisions for arbitration are applicable to the existing difference which Mr. Fitz Gibbon has been nominated to settle. Irrespective of all these considerations, however, the Dublin United Tramways Act of 1905 (3) appears to me to be conclusive against holding that the Acts of 1897 constitute a self-contained code.

A company was incorporated in 1896 called the Dublin United Tramways Company, 1896, Limited, which had become owner of all the share capital of the Dublin United Tramways Company of 1881, and of another company called the Dublin Southern District Tramways Company (except three shares of £10 each). The tramways of these two companies were being worked together as one undertaking, and it had become expedient that they should be transferred to, and vested in, the Limited Company of 1896; and the purpose of the Act of 1905 was to effect this transfer, which it did by its 3rd section. The existing company was thus constituted. Section 1 of the Act of 1905 set forth all the Dublin Tramways Acts and Orders, from the first Act of 1871 to 1903 (including the Act of 1875 and the Act of 1876), and enacted that they might be cited for all purposes as the Dublin United Tramways Acts and Orders, 1871 to 1903, and that they and the Act of 1905 might together be cited as the Dublin

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(1) 60 & 61 Vict. c. cccxxvi.

(3) 5 Ed. 7, c. clxv.

(2) 60 & 61 Vict. c. cccxxv.

K. B. Div. United Tramways Acts and Orders, 1871 to 1905. By section 3
 1909. of the Act of 1905 the undertakings of the Dublin United
THE KING Company of 1881 and the Dublin Southern District Company
(DUB. CORP.) were vested in the Limited Company, which it was thereby enacted
r. should carry them on, and (except as hereinafter expressly provided)
FITZ GIBBON. exercise and perform, and be charged with all the rights, powers,
Andrews, J. authorities, duties, obligations, and liabilities of the United Com-
 pany and the Southern District Company, granted, authorized,
 and imposed on those companies, or either of them, by the Dublin
 United Tramways Acts and Orders, 1871 to 1903, and a Rathmines
 and Rathgar Act of 1897 (1), therein referred to, as if the Limited
 Company had been named in such Acts and Orders instead of the
 United Company and the Southern District Company, respectively.
 There is nothing in this Act of 1905 inconsistent with the
 continuance in force of section 16 of the Act of 1875, which an
 examination of all the Acts, in my opinion, shows clearly to be
 still in force, subject, it may be, to such qualifications as I have
 referred to, which, however, in no way apply to the difference
 which the referee in this present case has been nominated by the
 Board of Trade to settle. It appears, as has been shown by
 Mr. Healy, from an examination of the various Dublin Tramways
 Acts, which authorize the construction of tramways, that they all
 contain provisions corresponding with section 33 of the Act of
 1870, or section 16 of the Act of 1875, except the Acts of
 1897, and that the absence of provisions corresponding with
 section 69 of the Act of 1875, wherever it occurs, can be
 explained; and section 61 of the Electrical Power Act, 1897,
 appears to supply any omission of this kind in any of the prior
 Acts, while there is nothing in the Acts of 1897 inconsistent
 with the continuance in force of section 16 of the Act of 1875
 so far as it relates (if it does) to the existing difference which the
 referee has been nominated to settle.

It was also argued on behalf of the Corporation, that the
 decision of this Court on the case stated in the year 1900, by
 Mr. Swifte, one of the Dublin Divisional Magistrates (2), on a
 complaint by the Corporation against the Tramway Company for

(1) 60 & 61 Vict. c. cxiv. (2) Unreported.

non-compliance with section 28 of the Act of 1870, incorporated in section 37 of the Electrical Power Act, 1897, in which the Corporation sought to enforce a penalty on the Company, under section 37, for not keeping their line in good repair and condition, so as not to be a danger or annoyance to the ordinary traffic; and the subsequent decision of this Court in the case of *R. (The Dublin United Tramways Company) v. Swift* (1), in which it was sought to prohibit him from proceeding to hear and determine summonses by the Corporation against the Tramway Company for penalties under section 37 of the Act of 1897, were in favour of the contention on behalf of the Corporation in the present case. These decisions are not reported in the ordinary reports, but we have been furnished with copies of the judgments delivered in them. I was a member of the Court by which the decision in the case stated was given, and Mr. Justice Johnson was a member of the Court by which the decision in the prohibition case was given. Neither of these cases affects the present one. The decision in the case stated was, that the remedy under section 37 of the Act of 1897 incorporating section 28 of the Act of 1870 was independent of that provided by section 33 of the Act of 1870, even if that section, or any enactment in the same terms, applied to the complaint in that case; and the Court in the prohibition case acted on that decision. In my opinion the judgments in these cases do not supply any authority whatever for the contention of the Corporation in the present case; nor, in my opinion, is any such authority to be found in either the decision or the judgments in the very recent case of *Rex v. Garrett and Hammersmith Borough Council* (2) in the present year, which appears to have been as yet reported only in vol. 73, *Justice of the Peace*, p. 188, and vol. 100 *Law Times (N.S.)*, p. 533. But that case appears to be an authority that the question whether the repairs by the Tramway Company of the road surface and these tramways, required by the Acts to be done to the satisfaction of the road authority, were such as the road authority ought reasonably to be satisfied with, was a matter in difference within section 33 of the Act of 1870, and must go to arbitration under that section.

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(1) Unreported. (2) 73 J. P. 188; 100 L.T. (N.S.) 533.

K. B. Div. Our decision then being that section 16 of the Act of 1875
 1909. is unrepealed and in force with reference to the existing Tramway
 THE KING Company's rights, powers, and privileges derived from the Acts
 (DUB. CORP.) of 1875, 1876, and 1897 in relation to the shed-connexion
 v. line, the next question for our decision is, whether the matter
 FITZ GIBBON. now in difference between the Company and the Corporation
 Andrews, J. comes within that section, and I entertain no doubt that it does.
 The Company desire to exercise the statutory power and right
 which they have to make the shed-connexion line, with the
 consent of the Corporation as the road authority. The Corpo-
 ration claim to have the right to refuse their consent, unless
 the Company agree to pay the Corporation a way-leave rental
 fixed by themselves, which in effect is a claim by the Corporation
 to a right of veto of the shed-connexion line; for if they have a
 right to refuse their consent unless the Company agree to pay
 a price for the consent of the Corporation fixed by the Corporation,
 they can in effect veto the shed-connexion line by refusing their
 consent except on payment of such price as they may choose to
 demand; and, in his reply for the Corporation, Mr. Ronan
 logically claimed for them their absolute right of uncontrolled
 veto. No authority has been shown to warrant the demand by
 the Corporation of a way-leave rental in respect of this shed-
 connexion line. Way-leave rentals between the Company and
 the Corporation originated in certain agreements between them,
 which were referred to in the course of the argument. No such
 agreements, nor any statutory recognition of any such agree-
 ment, exists in relation to the shed-connexion line. The present
 difference has nothing to do with any engineering question as to the
 manner in which the shed-connexion line ought to be constructed,
 or the like. The Corporation in effect claim the right, not only
 to veto the shed-connexion line, but to sell their consent to it
 on their own terms—in fact, to deal with it as an asset, which
 they can realize for their own advantage if the Tramway Company
 will purchase it, and not as a power conferred on them to be
 exercised for the protection of the public, and not to be exercised
 for their own profit. Even without authority for the proposition,
 one would think it reasonable and right to hold that their consent
 cannot be regarded as absolute, but must be reasonably given,

or reasonably refused. Mr. Ronan pressed upon us Lord Cottenham's observations in the case of *Webb v. The Manchester and Leeds Railway Company* (1) in the year 1839. That was a case in which the Railway Company were seeking to exercise powers of compulsory purchase over a piece of land, the whole of which it was denied that they had power to take. The evidence as to their power to take the whole of it was unsatisfactory. It depended on whether they required the whole of it, so as to entitle them to take it compulsorily. I do not presume to differ from Lord Cottenham's observations in that case, that it is extremely important to watch over the interests of those whose property is affected by such companies as that Railway Company; that it is the duty of every Court to keep them most strictly within their powers; and that if there were a doubt about the extent of those powers, the Company would have to go elsewhere to get enlarged powers, and would get none from His Lordship by way of construction of their Act. That was a very different case from the present. The Tramways Company in the present case have a statutory right to make a shed-connexion line, with the consent of the Corporation. It is a facility to the working of their system, in which the public have an interest as well as the Tramway Company; and in the case of *The Queen v. The Croydon and Norwood Tramway Company* (2), whose Act (3), by section 41, required the work therein referred to in relation to the construction of the Company's line to be done "to the satisfaction" of the Croydon Corporation, and in which section 33 of the Act of 1870 (4) was incorporated, Lord Esher said (at pp. 41 and 42 of the report): "Now is there anything inconsistent in the view that the question of whether the local authority has acted reasonably or not is to be referred to the Board of Trade, with what are called the absolute terms of the 41st section of the Private Act. I cannot see myself that however absolute an authority may be in terms in the first instance, it is inconsistent to say that if that authority is exercised unreasonably the question of unreasonableness may be decided by a superior tribunal. This

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(1) 4 My. & Cr. 116.

(2) 18 Q. B. D. 39.

(3) 46 & 47 Vict. c. clxxiv.

(4) 33 & 34 Vict. c. 78.

K. B. Div. 1909. — would leave to the local authority absolute power upon the terms of their exercising that power reasonably." And further on he proceeds thus: "However despotic their authority may be, in the first instance they must exercise it reasonably, and reasonably according to the decision of the superior tribunal or the superior authority. That is the sort of supervision that in many instances is given to the Board of Trade. Therefore, expecting to find that power of supervision given to the Board of Trade, I look to the 33rd section, and I cannot help thinking that to give or refuse assent to certain proposed acts is, and must be, exercising control at all events; that the exercise of that control is within the 33rd section, and that it must be seen whether that control or authority has been exercised reasonably or not. I think, therefore, there was a question to go to the referee of the Board of Trade as to whether the Corporation had exercised their control reasonably or unreasonably, and until that was decided no such mandamus as was asked for could be granted." Lindley, L.J., was of the same opinion; and Lopes, L.J., said: "I think the difference which has arisen in this case is a difference which is expressly contemplated by the words in section 33 of the *Tramways Act, 1870* (1), 'or on the question whether any work is such as ought reasonably to satisfy the Local Authority.' It appears to me that these words were introduced for the purpose of meeting a case such as this. They were introduced for the purpose of preventing any unreasonable or despotic action on the part of the local authority."

Now, turning to the words of section 16 of the *Act of 1875* (2), which are as follows:—[His Lordship read the section, and continued] I cannot entertain any doubt whatever that the difference which exists between the *Tramway Company* and the *Corporation* is within it, and has been rightly referred to the referee to settle. The words of that section are quite general. It embraces *any* difference which comes within its terms, which include any difference between the *Tramway Company* and the *Corporation* with reference to any control claimed by the *Corporation* in relation to any of the *Company's* works, or with respect to any other

(1) 33 & 34 Vict. c. 78.

(2) 38 & 39 Vict. c. ccix.

thing regulated by or comprised in the Act. Differences of great importance, and, it may be, of great difficulty to settle, may then arise, as well as differences of slight importance and little difficulty. I do not think this Court can draw a line, and decide that certain differences coming within the general terms of the section are to be the subject of settlement by the referee, and that certain others are not. Mr. Ronan argued the improbability of its having been intended that questions of great importance and difficulty should be submitted for final determination by the referee; but I think the Legislature has provided that they may, if they arise. The Board of Trade is entrusted with the power of nominating a fit person as referee. In doing so the Board will have regard to the character of the difference. If it relates to engineering matters, the Board may nominate an engineer; and if difficult questions of law or fact are involved in the settlement of the difference, the Board can, and of course will, nominate a fit person to deal with them; and in the present case they have nominated as referee a gentleman to whose fitness to settle the existing difference, and every question which its settlement may involve, no exception has been, or could be, taken. We hold that the Corporation has no absolute uncontrolled right of refusing their consent to this shed-connexion line; and we offer no opinion in relation to some wholly different work, such as a new tramway through Grafton street, as suggested by Mr. Ronan.

Our decision that section 16 of the Act of 1875 (1) is in force in relation to the difference in question, and our decision that this difference comes within that section, render it unnecessary to decide in this case the further and novel question, whether prohibition lies against this referee; as, even if it does (which we do not decide), the prohibition applied for cannot go, and the conditional order must be discharged. No case has been found in which such a referee has ever been prohibited, although there must have been many such references since 1870. It is not disputed that prohibition will not lie against an ordinary arbitrator; but arguments well worthy of consideration have been advanced both in support of and against the proposition that

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prohibition will lie against such a referee as has been nominated in the present case; though this question was not dealt with by Mr. Ronan in his reply for the Corporation; and we think it undesirable to offer an opinion on a new question of such importance in a case in which its decision is unnecessary. We, therefore, leave the Court and ourselves unfettered on this question by abstaining from giving an unnecessary decision upon it in the present case.

The conditional order will be discharged with costs.

JOHNSON AND BOYD, JJ., concurred (1).

Solicitor for the Corporation: *Ignatius J. Rice*, Law Agent.
Solicitors for the Tramway Company: *Casey, Clay, and Collins*.

J. C. W.

(1) An appeal from the decision of the King's Bench Division was lodged by the prosecutors; but was subsequently withdrawn.

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CHARLES F. BECHER (1).

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Feb. 11, 23.

Charity—Bequest to Society for Conversion of Roman Catholics in Ireland—

*Purposes merely charitable—Legacy duty—Exemption—5 & 6 Vict. c. 82,
s. 38.*

A testatrix, domiciled in Ireland, bequeathed a legacy to the Society for Irish Church Missions. The object of this Society, which had its head office in London, was "to promote the glory of God in the salvation of the souls of our Roman Catholic fellow-subjects in Ireland, through the instrumentality of the Church of Ireland."

Held, that the legacy was for purposes in Ireland merely charitable, and was therefore exempt from legacy duty.

INFORMATION by the Attorney-General claiming legacy duty.

The material facts as admitted by the pleadings and otherwise were as follows:—

By her will, dated the 4th December, 1903, Elizabeth Mary Stewart, late of Stonehenge, Killiney, in the County of Dublin, spinster, bequeathed (*inter alia*) to the "Irish Church Missions" a sum of £100, and appointed the defendants the executors of her will. She died on the 28th December, 1906, and probate of her said will was on the 21st March, 1907, granted to the defendants, the executors named therein.

After the testatrix's death, the Commissioners of Inland Revenue claimed from the defendants, as her executors, legacy duty at the rate of 10 per cent. in respect of the said legacy, pursuant to the provisions of 5 & 6 Vict. c. 82. The defendants refused to pay the legacy duty claimed, contending that the legacy was exempt from duty under the provisions of section 38 of 5 & 6 Vict. c. 82.

The information prayed (*inter alia*) to have it declared that legacy duty at the rate of 10 per cent. became payable after the

K. B. Div. death of the testatrix in respect of the said legacy, and that the
 1910. defendants might be ordered to pay the sum of £10 to the Com-
ATTY.-GEN. missioners of Inland Revenue in respect of such duty.
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The object of the Society for Irish Church Missions, as set forth in its annual published reports, is "to promote the glory of God in the salvation of the souls of our Roman Catholic fellow-subjects in Ireland, through the instrumentality of the Church of Ireland." The head office of the society is in London.

The Attorney-General (The Right Hon. Redmond J. Barry, K.C.) (with him *Coll.*), in support of the information :—

It will scarcely be contended that the legacy in the present case comes under either of the first two exemptions in section 38 of 5 & 6 Viet. c. 82, and, therefore, the principal question for decision is, Do the objects of the Society for Irish Church Missions come within the description of purposes merely charitable? We admit that since the decision of the House of Lords in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1) it cannot be contended that the idea of relief of the poor is essential to constitute a charitable purpose. We submit, however, that the fundamental notion of charity in its legal sense is the public benefit. In *Pemsel's Case* (1) Lord Macnaghten states (p 583) that "charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads; thus showing that charity in its legal sense involves in every case the idea of benefit to the community. In *Cocks v. Manners* (2) Sir John Wickens, V.-C., says (p 585):—"It is said, in some of the cases, that religious purposes are charitable; but that can only be true as to religious services tending directly or indirectly towards the instruction or edification of the public." It is for the Court to determine whether the object is for the public benefit or not; that it is so in the opinion of the testator is not sufficient. The test to be applied

(1) [1891] A. C. 531.

(2) L. R. 12 Eq. 574.

is an objective, not a subjective one. In *Attorney-General v. K. B. Div.*
Hall (1) a bequest to a Roman Catholic priest to be applied for 1910.
 Masses to be celebrated *publicly* for the repose of the testator's ATTY.-GEN.
 soul, was held charitable, the ground of decision being the public v.
 edification which, according to the Roman Catholic faith, resulted. BECHER.
 In giving judgment in the Exchequer Division, Andrews, J.,
 says (p. 315) that if the religious purpose be of a nature which
 in the judgment of the Court confers in its execution a benefit on
 the public, or a denomination of the public, by tending to their
 religious edification, it is a valid charitable purpose within the
 section. In *Attorney-General v. Delaney* (2) a bequest for Masses
 for the soul of testatrix and her brother, there being no direction to
 celebrate them in public, was held not to be charitable, the Court
 being of opinion that such a bequest did not tend, either directly
 or indirectly, to the benefit of the public. Palles, C.B., says
 (pp. 126, 127): "I am of opinion that a gift for a religious or for
 any other purpose, to be charitable within the statute of Elizabeth,
 must, to some extent at least, be in the nature of a general public
 use. It must be of such a nature that the Court can determine
 that its execution shall confer a benefit upon the public, or upon
 some section of the public." That case was, no doubt, subse-
 quently over-ruled by *O'Hanlon v. Logue* (3); but the decision of
 the Court of Appeal (which included Palles, C.B.) in the latter
 case went on the ground that, on further consideration of the
 nature of a Mass, the Court was satisfied that according to the
 faith of the Roman Catholic Church there was a public benefit
 to the general body of the faithful, even though the Mass was
 not celebrated in public. In *Webb v. Oldfield* (4) Fitz Gibbon, L.J.,
 lays down (p. 446) that the benefit must be one which the founder
 believes to be of public advantage, and his belief must be at least
 rational; thus showing that the belief of the testator is not con-
 clusive, but the reasonableness of that belief is to be determined
 by the Court. Walker, L.J., says (p. 450) that there may be
 cases in which the Court would feel itself at liberty to set up its

(1) [1896] 2 I. R. 291; [1897]
 2 I. R. 426.

(3) [1906] 1 I. R. 247.

(4) [1898] 1 I. R. 431, 440.

(2) 1 I. R. 10 C. L. 104.

K. B. Div. own view against that of the giver [Gibson, J., referred to
 1910. *Thornton v. Howe* (1)]. The basis of the judgment in that case
ATTY.-GEN. is, that the works of Joanna Southcott were written with a view
v. to extending the influence of Christianity. In the present case it
BECHER. cannot be said that the bequest is for the public benefit. All
 Christian religions are in this country now equal in the eye of
 the law, and therefore to convert a person from one form of
 Christian religion to another can never be considered as being for
 the public benefit. So far from being productive of public benefit,
 the objects of this Society are calculated to cause strife between
 different sects of Christians. The Society itself obviously con-
 sidered its objects not within any of the exemptions, having paid
 duty on all legacies up to the present.

Secondly, even assuming that the purposes of the Society are
 charitable, these purposes are not confined to Ireland, and the case
 is not within the exemption: *Attorney-General v. Hope* (2). The
 head office is in London, and the funds of the Society need
 not necessarily be spent in Ireland.

S. L. Brown, K.C., and Poole, for the defendant:—

The test of whether an object is for the public benefit or not
 is the belief of the testator, and the Court will not inquire whether
 that belief is right or wrong, but will accept it as conclusive, sub-
 ject to four limitations:—1. The object must not be adverse to
 the foundation of all religion. 2. It must not be subversive of
 all morality. 3. It must not be contrary to the general law of the
 land. 4. The belief of the testator must be rational: *Thornton v.*
Howe (1); *Webb v. Oldfield* (3); *per FitzGibbon, L.J.* (pp. 446, 447).
 A rational belief must be taken to mean not necessarily a belief
 which is, in the opinion of the Court, well founded, but one which
 a rational person might hold. In the present case the bequest is
 clearly not adverse to all religion or morality; it is not contrary
 to the general law of the land; and the Court, although it might
 not itself hold the objects to be for the public benefit, cannot say
 that a rational person might not hold such belief. In *In re*

(1) 31 Beav. 14. (2) I. R. 2 C. L. 368. (3) [1898] 1 I. R. 431, 440.

Foveaux (1), Chitty, J., in [holding a bequest to certain societies for the suppression of vivisection to be charitable, says (p. 507):—
 “The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion.” It has been contended that because the object is of a proselytising character this gift cannot be charitable. But in *West v. Shuttleworth* (2) a bequest to Roman Catholic priests to promote the knowledge of the Roman Catholic religion among the poor and ignorant inhabitants of certain districts in Yorkshire was held charitable, although there, as was pointed out in the argument, the object must have been to make proselytes. In *In re Delmar* (3) a gift “to the Protestant Alliance, or some one or more kindred institutions, having for their object the maintenance and defence of the doctrines of the Reformation, and the principles of civil and religious liberty against the advance of Popery,” was admitted to be charitable. [They also referred to *In re Scowcroft* (4), *Attorney-General v. Bagot* (5).]

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As regards the second point, the testatrix was an Irishwoman, who died domiciled in Ireland, and the object of the Society is the salvation of souls in Ireland. The legacy, therefore, is for purposes in Ireland.

The Attorney-General in reply.

Cur. adv. vult.

LORD O'BRIEN, L.C.J. :—

Feb. 23.

A pious lady, a member of the Episcopalian Church, and from her point of view entirely well-intentioned, bequeathed a sum of £100 to the Society for Irish Church Missions to Roman Catholics. The object of that society is, to use the language of the annual report, “to promote the glory of God in the salvation of the souls of their Roman Catholic fellow-subjects in Ireland, through the

(1) [1895] 2 Ch. 501.

(4) [1898] 2 Ch. 638.

(2) 2 My. & K. 684.

(5) 13 I. C. L. R. 48.

(3) [1897] 2 Ch. 163.

K. B. Dir. instrumentality of the Church of Ireland." This is the language
 1910. used in the report, it is not mine; I am anxious to quote it
ATTY.-GEN. precisely as it is. Whether legacy duty is to be paid on that
v. bequest is the question that we have to determine; and the
BECHER. solution of this question depends upon whether the bequest is,
Lord O'Brien, in the eye of the law, a charitable one; whether it is, in the
L.C.J. language of the relevant statute, "merely charitable." What,
 then, is the test to ascertain this? Is it a subjective one or an
 objective one? Does it depend upon the views of the testatrix,
 having regard to the doctrines of the Church to which she belonged,
 or is the test to be found in the opinion of an external authority? To
 be of a charitable character, the bequest must be, according to legal
 requirements, for the public benefit, or for the benefit of a substantial
 portion of the public. How is the question as to whether a gift by will
 is for the public benefit to be determined? Does it depend upon the
 views of the testatrix, having regard to the religion she professed, or
 does it depend upon the opinion of an external authority, such as a Court
 of Law, having regard to the particular character and object of the bequest?
 Is the test, so to speak, subjective or objective? In discussing the general
 question before us, whether the bequest we are considering is of a purely
 charitable character, the first thing to be remembered is, that in this
 country, having regard to the Toleration Act, and to the fact that a
 State Church no longer exists in Ireland, all churches, all Christian
 churches at least, stand on an equality before the law; the law makes
 no discrimination as to what religion is the right one, or what the wrong
 one. Having regard then to this equality before the law, the Attorney-
 General, with much plausibility, asks how, if a charitable bequest
 depends for its character as such upon benefit to the public, can we,
 the ministers of the law, discriminate between religions, and say that
 the fact that Roman Catholics should be converted to Protestantism
 confers any benefit on the public, or on any substantial portion of
 the public? The law, he says, does not discriminate; and how can we,
 its ministers, do what the law itself refuses to do? This is certainly
 very plausible, but is it sound? I think not. Why? Because the test
 as to whether a bequest is of a charitable nature is a subjective and
 not an objective one. It depends, subject to certain

well-defined limitations, upon the view taken by the testator or testatrix, as the case may be. The controversy is not to be solved by an objective test—that is to say, by the opinion of an external authority as to the truth, or benefit to the public, of any given religion. Whatever our individual opinions in our private capacities may be, we cannot as Judges say, what the law itself does not say, that any one religion confers upon the public a greater benefit than another. For us to attempt to discriminate between what is truth and error in matters of religion would be a mere idle, arrogant pretension, calculated to result in a disedifying, unseemly welter of conflicting opinions.

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In giving judgment in the well-known case of *Thornton v. Howe* (1) Sir John Romilly, Master of the Rolls, said (p. 20):—“Neither does the Court . . . make any distinction between one sect and another. It may be that the tenets of a particular sect inculcate doctrines adverse to the foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void.” This is the language of the distinguished Judge.

But to recur to the subjective test, let me take the case of a conscientious Protestant. He or she, as the case may be, regards the Protestant religion as the true one, and considers its maintenance and extension to be for the public benefit. So likewise the conscientious Catholic. He too deems his own religion to be the true one, and he believes that its maintenance and extension are for the public benefit. This I might describe as the subjective view, and, in my opinion, it affords the true test as to whether a bequest is a charitable one or not, subject, however, to this limitation, that there must not be in the bequest anything contrary to law, morality, or public policy. In the bequest with which we are dealing, there is nothing contrary to law, morality, or public policy. In the eye of the law, as I have said, all religions, at least all Christian religions, stand upon equality; and there is nothing legally unjustifiable in the fact that a man who professes a certain faith should endeavour to bring within the fold of which he is a member those who belong to another religious persuasion. Of

K. B. Div. course in relation to this matter of conversion from one faith to
 1910. another, I do not refer—no such reference has been made either
ATTY.-GEN. at the Bar or on the Bench—to those sordid methods, or to those
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 been a scandal to Christianity; nor to those inducements of a
Lord O'Brien, material character, which are, I understand, sometimes held out in
L.C.J. foreign countries, and which, I am told, have resulted in producing
 a herd of so-called converts, who are, as a brilliant statesman of
 the present day has told us, referred to as “Rice-Christians.” I
 refer solely to those methods of conscientious persuasion, which
 appeal to what are believed to be the truths of religion, and are
 not condemned by law, morality, or public policy. No religion,
 whatever its denomination, should stand lower in public estimation,
 nor in any way be derogated from, merely because there has been
 an abuse of it; so too we have no right to condemn any charity,
 merely because there may exist abuses in the method of its ad-
 ministration. He who attempts to disseminate a religion may,
 for sordid personal ends, or in a moment of indiscriminating and
 excessive zeal, have recourse to methods contrary alike to justice
 and morality; but we should be careful not to condemn the
 religion itself because some who profess it resort for its propa-
 gation to means of which we disapprove. This is an obvious
 truth, an obvious obligation; nevertheless we often hear from
 the unthinking and irresponsible crowd the cry, the question,
 “What manner of religion can it be which has produced such a
 man as that?” Such condemnation of a religion receives no
 sanction from charity in its truer and higher sense.

But let me proceed. It is not, I think, denied that a bequest
 to promote, to advance, the Protestant religion would be a valid
 charitable bequest; and, after all, is not that the ultimate object,
 or, perhaps I should say, will not that be the effect of the bequest
 here if the money bequeathed is from the point of view of the
 testatrix successfully applied? The immediate object of the
 Society to which this pious lady entrusts her money, and through
 which she hopes to apply it, is, to use the language of the report
 I have already referred to, “to promote the glory of God in the
 salvation of the souls of Roman Catholics, through the instrumen-
 tality of the Church of Ireland.” The law sees nothing objection-
 able in this. No doubt, if there be from the point of view of the

testatrix a successful administration of the money bequeathed, the area of Protestantism will be enlarged; but this result would be in no way opposed to law, nor condemned by the general principles of morality. And this would be so, no matter how sincerely, how enthusiastically, the adherents of different creeds believe in their respective religions. The motive of the testatrix, in making the gift she did make, is entirely unselfish and altruistic. So far as is expressed, she purports to seek no benefit for herself; her concern is with the salvation of the souls of others. No doubt in her own secret soul she may have thought that doing what seemed to her a good work here would enhance her merit before an infallible, an omniscient tribunal hereafter. But this would not deprive the gift of its charitable character.

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To-day it is our duty to determine whether a bequest in the will of a devout Protestant lady is, in the eye of the law, of a purely charitable character. To-morrow—such are the varying phases of our judicial life—it may be incumbent on us to discharge a like function in relation to the will of a devout Catholic lady; but, however much the objects of their bounty may differ, the principles of judicial decision in our Courts of Justice shall remain the same. Having considered the case with all the care I could bestow upon it, I am satisfied that the bequest with which we are dealing is, in the eye of the law, a valid charitable bequest.

Upon this subject of charitable bequests there is a host of cases; the difficulty, however, is to select from the mass of legal decisions the test, the guiding principle, which is of general application. Perhaps the most authoritative case of recent times in this country is that of *O'Hanlon v. Logue* (1). His Eminence the Cardinal Archbishop was the defendant in that case. It was the concurrent decision of the Lord Chancellor, the Lord Chief Baron, Lord Justice Fitz Gibbon, and Lord Justice Holmes. The question debated and affirmed in that case, whether a bequest for Masses to be said in perpetuity was a valid charitable bequest, was of course different from what we are here concerned with; but the guiding principle in determining whether a bequest is of a charitable nature is most clearly deducible from the judgment in that case. The present Lord Chancellor is reported to have

(1) [1906] 1 I. R. 247.

K. B. Div. said (pp. 259, 260): "There are some legal propositions germane to the case for which it would be mere pedantry to cite authority—
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ATTY.-GEN. v. BECHER. (a) that in speaking of what is 'charitable,' we use the word in the artificial sense which is derived from the Statute 43 Eliz. c. 4 (Eng.) and 10 Car. 1 sess. 3, c. 1 (Ir.); (b) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (c) that a gift for the advancement of 'religion' is a charitable gift; and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the law, and this especially applies since the abolition in this country of a State Church. Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality." A remarkable illustration is furnished by the decision in *Webb v. Oldfield* (1), a gift for the spread of vegetarian principles—ideas that might be in the view of many erroneous and visionary." This passage in the Lord Chancellor's judgment is a very succinct statement of the law; and bears out the view I have taken. The Lord Chief Baron concurred; his judgment was very learned and exhaustive, and the more impressive because he changed his opinion. After the most anxious consideration he surrendered the opinion to which he gave effect in the *Attorney-General v. Delaney* (2); indeed I think his judgment in *O'Hanlon v. Logue* (3) went to the length of making the test of whether a bequest was charitable or not a subjective instead of an objective one. He deferred to the opinion of those who practised what he styled a theistic religion, as to the public advantage it conferred, and he did not take it upon himself, as an external authority, as a Judge, to decide that point himself (see the last two pages of his judgment, where he deals with what he refers to as his third reason). Of course in every case there is a limitation as to the bequest not being

(1) [1898] 1 I. R. 431.

(2) I. R. 10, C. L. 104.

(3) [1906] 1 I. R. 247.

contrary to morality or law. Lord Justice Fitz Gibbon, who took a very great interest in the question under deliberation, also delivered an attractive judgment, but his view may be made the more clear by reference to the judgment of Lord Justice Holmes, who, by placing in apposition—in juxtaposition—the view of the Lord Chief Baron, in *Delaney's Case* (1), which, with his own concurrence, was overruled, and the view of Lord Justice Fitz Gibbon in *Hall's Case* (2), brought out the test, the guiding principle of the decision, with great distinctness. Lord Justice Holmes in his judgment (see page 284 of the report) pursues the test, the guiding principle, from the words, “On what grounds is it argued that the bequest in the *Attorney-General v. Hall* (3) is charitable, while that in the *Attorney-General v. Delaney* (1) is not,” down to the end of his judgment. All of this is very relevant, but I will content myself with giving one excerpt from it. After, as I said, placing in apposition the view of the Lord Chief Baron in the *Attorney-General v. Delaney* (1), and that of Lord Justice Fitz Gibbon in the *Attorney-General v. Hall* (3), the Lord Justice proceeds as follows (p. 285):—“It will be observed that the difference in the propositions laid down in the two passages I have quoted is, that in one it is stated that the Court cannot derive the element of public benefit from the efficacy, spiritual or temporal, which, according to the faith of the testator, the religious act may possess, but must ascertain the existence of such benefit by independent investigation; while in the second passage the belief of the testator and of the Church to which he belongs is made the only test.”

This last test in the so-called second passage is that which the Lord Justice, in common with the other members of the Court, ultimately adopted as the true test, and which I believe to be and adopt as the true test. It is what I have referred to as the subjective test, and makes the guiding principle of decision in a case like the present the faith of the testatrix, and of the Church to which she belonged. This concludes the case against the Crown and in favour of the defendants. Many other decisions, such

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(1) I. R. 10 C. L. 104.

(2) [1897] 2 I. R. 426.

(3) [1897] 2 I. R. 426.

K. B. Div. as *West v. Shuttleworth* (1), *Pemsel's Case* (2), and *Webb v. Oldfield* (3), might be referred to with advantage here. They are of historical and forensic interest. But if we can, with certainty, ascertain the true guiding principle of decision, that, in my opinion, is sufficient without any minute analysis of a plethora of cases.

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GIBSON, J. :—

The question for decision is, whether the Society for Irish Church Missions to Roman Catholics is a charity within 5 & 6 Vict. c. 82, sect. 38, which exempts from legacy duty legacies for any purpose in Ireland merely charitable. It was not disputed that, having regard to *Pemsel's Case* (2), legacies for religious purposes were within the exemption, as was indeed assumed in *Attorney-General v. Hope* (4).

The exemption goes back so far as the year 1816, and is a transcript of 56 Geo. 3, c. 56, Schedule III, at end. At that date, when, notwithstanding partial alleviation, Roman Catholics were under grave disabilities, illustrated by such cases as *Attorney-General v. Power* (5), and *De Themmines v. De Bonneval* (6), and when the State still regarded Roman Catholics with a certain amount of distrust and apprehension, the present question could hardly have arisen. In 1842, when the statute now under consideration became law, many disabilities still remained, such as the Transubstantiation Oath (required as a qualification for certain offices), abolished by 30 & 31 Vict. c. 62; there was an Established Church, as to the effect of which see *R. v. Gathercole* (7), and when the Irish Church Missions Society was founded in 1849, the attitude of the State would have made it difficult to contend that missionary enterprise directed against Catholicism would not have then been a valid religious charity.

This historical aspect of the case, which was not adverted to

(1) 2 My. & K. 684.

(2) [1891] A. C. 531.

(3) [1898] 1 I. R. 431.

(4) 1 I. R. 2 C. L. 368.

(5) 1 Ball & Beatty, 145 (1809).

(6) 5 Russell, 288.

(7) 2 Lewin C. C. at page 254.

by counsel in argument, suggests considerations not without possible importance. Religious liberty, however, now happily prevails, and is enjoyed by Roman Catholics as well as by all other Christian denominations, and the Jews. The connexion between Church and State in Ireland has been severed, and the case has been argued on the broad question whether the section in relation to present conditions applies to propaganda carried on by one Christian denomination against another. Up to the present, legacy duty has been paid by the Society, the Attorney-General states, without question. Whether income tax has been exacted since *Pemsel's Case* (1), does not appear. The Attorney-General contends that missionary enterprise by one lawful sect against another cannot be a valid religious charity. Mr. Brown argues that all missionary enterprise, whether between such sects, or by them or against them by non-Christians, is a good charity, and within the statute.

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Upon the question now presented for decision there appears to be no direct authority, and I have endeavoured carefully to examine the legal principles underlying the controversy, and any cases which may assist its solution.

There are many statutes in England and Ireland with similar exemption clauses, such as the Poor Law and Valuation Acts, but I propose to confine my attention strictly to the Legacy Duty Act of 1842, and to the legality in Ireland of controversial propaganda of one branch of the Christian Church recognized by statute law against another branch similarly recognized. At the date of the enactment, besides the State Church there were two classes of denominations enjoying legislative rights, subject to certain restrictive conditions.

The first of these was the class of Protestant dissenters, including Non-Trinitarian dissenters, such as the Unitarians, who, according to the unanimous opinion of the Judges advising the House of Lords in *Shore v. Wilson* (2), could lawfully endow and propagate their faith, in that case described as a belief negating the dogmas of the Trinity, original sin, and the Atonement. The second class was composed of Roman Catholics, who, by the

(1) [1891] A. C. 531.

(2) 9 C. & F. 355 (1839).

K. B. Div. 1910. Emancipation Act were given partial relief, and who, by the Act of 1832, c. 115, in Great Britain, were made subject to the same laws as Protestant Dissenters in England. The Jews Relief Act was not passed till some years later, 9 & 10 Vict. c. 59, but in *Straus v. Goldsmid* (1), it had been held (contrary to previous decisions in *De Costa v. De Paz* (2), and the *Bedford Charity Case* (3), that a gift to maintain the Jewish religion was valid. The Jewish Relief Act made Jews subject to the same laws as Protestant Dissenters. It seems strange that in this English legislation Roman Catholics and Jews should have been afforded relief by being put with the class of Protestant Dissenters: 18 & 19 Vict. c. 86, s. 1 as to places of worship.

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Broadly speaking, there are thus at present in Ireland four religions enjoying statutory recognition with defined rights: the Church of Ireland, Protestant Dissenters of all classes, Roman Catholics, and Jews.

I now take up the question argued. I doubt if it is to be determined by the principles governing non-religious charities, as to which it is settled that the charitable motive and intent to benefit humanity physically or morally supply the sole test, so that mutually antagonistic systems of essentially propagandist character are legal objects of charitable bounty. A society to further anti-vivisection principles, or to promote vivisectionist research, to oppose restrictive legislation as to contagious diseases, or to support such legislation, &c., may be all equally in the eye of the law charitable, though one or other of such contradictory objects must be mischievous in fact. The Court, when satisfied of the existence of the charitable motive and intent, declines to consider the truth, soundness, or utility of the objects advocated or taught. If the principle governing such charities was applicable in its full extent to religious charities, this would go far to decide the present controversy. It is because I am not quite satisfied that there may not be a distinction between such charities and religious charities, that I add some remarks, without, however, expressing any concluded opinion.

(1) 8 Sim. 614 (1837). (2) 2 Sw. 487, note a. (3) 2 Sw. 470.

The decision in *O'Hanlon v. Logue* (1), where the question related solely to Christian worship, is based on the position that religious charities, like ordinary charities, depend for their validity solely on the subjective creed and intention of the donor, subject to conditions that the objects contemplated are not immoral or contrary to law, and are intended to be for the benefit of others; such conditions being of an objective character. In his judgment at p. 270, Lord Justice FitzGibbon lays down that non-Christian religions must stand equal before the secular Courts in a country like Ireland where no particular religion is established by law, and no particular faith has been declared superstitious by statute. The proposition at once invites the question put during argument by my Lord: What is religion? A purely negative system like that of the agnostic, who, with Lucretius, might earnestly believe all dogmatic religions to be mischievous superstition—"Tantum religio potuit suadere malorum"; monotheism of the deist or Mahomedan, dualism of Zoroaster, polytheism, a cult not founded on any belief in a Supreme Being or the survival of the soul, Buddhism, the religions of China and of Japan, represent the faith of large sections of mankind, including subjects of the Empire. Gifts for Christian theism, such as Unitarianism, or for Judaism, it is certain, and gifts to theistic faith, not resting on any revealed religion, such as is adopted by many in the United Kingdom, it is probable, would now be deemed valid. But I am not aware of any authority going further.

Christianity, once described as part of the law of the land—a description occurring as late as 1867 in the judgment of Kelly, C.B., in *Cowan v. Milbourn* (2)—may now be attacked in all its doctrines, inspiration of Scripture, miracles; so may the Established Church of England, its orders and teaching, without committing any legal offence, provided the decencies of controversy are observed. The charges of Coleridge, C.J., in *Reg. v. Bradlaugh* (3) and *Reg. v. Ramsay* (4) accurately describe the legal situation.

(1) [1906] 1 I. R. 247.

(2) I. R. 2 Ex. at p. 234.

(3) 15 Cox, C. C. 217.

(4) *Ibid.* 231.

K. B. Div. But in a State whose fundamental institutions are based on
 1910. Christianity in its widest sense—not particular dogmatic standards,
ATTY.-GEN. but Christian ethics, and conception of duty—with Christianity
v. penetrating everywhere, the Throne, marriage, the standard form
BECHER. of oath, Sunday, the law of blasphemy, and two parts of the
Gibson, J. United Kingdom possessing Established Churches, the freedom of individual action which all enjoy may not carry with it a right to dedicate in this kingdom funds in perpetuity for the support of any and every religion honestly believed by the giver to be for the benefit of mankind, or for propagation of such religion by missionary attack on Christianity. There may be a question of broad public policy in a Christian society which may impose on religious charities a limit not applicable to ordinary charities where the subjective charitable intent may be supreme. A monotheist Mahomedan, or a dualist Parsee father, dying in England, may be entitled to have his child's religion respected and enforced : *Re Besant* (1); but does this involve that he could found a valid charity to maintain his faith in England? or—a more difficult proposition—to convert Christians to the creed of Islam or Zoroaster? In any case—however wide may be the general meaning of charity—the term in the Act of 1842, which is local in character, invites a narrower interpretation. Parliament hardly could have intended to exempt from legacy duty an anti-Christian propaganda, though Mr. Brown boldly pushed his argument to that extent. The observations of Palles, C.B., in *O'Hanlon v. Logue* (2), were confined to theistic religion, and I venture to think from his reference in *Reg. v. Dee* (3) to the Christian character of this country, and its social institutions, that his language was not intended to apply to such religions as I have noticed, or to state any opinion on the wide question suggested by Lord Justice Fitz Gibbon's judgment.

I notice this question to explain why I do not rely on the vivisection and similar cases on the general law of charities as safe or conclusive guides in reference to religious charities—particularly under a statute like that of 1842.

(1) 11 Ch. Div. at p. 520.

(2) [1906] 1 I. R. 247.

(3) 14 L. R. Ir. at p. 489.

Confining myself to that enactment, and restricting the controversy to recognized and tolerated religions, I am of opinion that propaganda may be regarded as a valid charitable purpose.

All Christian Churches recognize the missionary duty. Such missions usually deal with foreign, non-Christian countries; but there are also Home Missions. The Salvation Army of General Booth is largely addressed to missionary work in the United Kingdom. An example of a legacy to him "for the spread of the Gospel" will be found in *Lea v. Cooke* (1). Every gift to a sect is intended to dignify, elevate, and strengthen it, and to enlarge its sphere of activity; incidentally, such gifts, by rendering the Church benefited better and more efficient, tend to win over adherents.

Every lawful denomination is entitled to vindicate and recommend for acceptance its own doctrines, and expose the supposed errors of rival creeds. Between such religious attack (which is lawful: *R. v. Gathercole* (2), *R. v. Ramsay* (3)) and persuasion to quit the supposed erroneous creed, and to join that of the assailant denomination, it is difficult to draw any satisfactory distinction. Whether such sect's charitable efforts are addressed to the community at large, or to some particular denomination, on account of its supposed greater spiritual peril, or greater likelihood, from doctrinal affinities, to become converts, the object is the same, the spiritual benefit of their fellow-creatures.

All will agree that the surest and best means of attracting others to join a Church is the pious, virtuous, and orderly life of its members. Many may think that true Christianity may be hurt, and its moral development and influence hindered, by controversial propaganda, tending to revive or stir up mischievous strife and animosities, the danger of which is illustrated by many untoward incidents. But in recognizing the validity of religious bequests to sects with diverse and contradictory creeds, the truth of which the State forbears to investigate, the law acts on the twofold principle that liberty and equality in religion, as well as in other fields of thought and action, are for the public good; and

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(1) 34 Ch. Div. 528. (2) 2 Lewin, C. C. 254. (3) 15 Cox, C. C. 231.

K. B. Div. that religion, even erroneous, subject to the conditions I have
 1910. indicated, is a good thing. It is better to have some religion
ATTY.-GEN. than none. This principle alone can reconcile and explain the
v. various authorities in which it is laid down that a charity must
BECHER. be for the public benefit; the proposition must be understood in
Gibson, J. this sense, and not as meaning that the religious charity is
 doctrinally true. Every valid charity must be for public not
 private purposes. The responsibility is left to the conscience of
 the pious donor, which the law accepts as binding. The Court
 gives effect to a religious purpose which the individual Judge may
 regard as mischievous, false, and even irrational.

I add three illustrations of propagandist religious charity
 directed against special objects and tenets which have occurred to
 me—one not improbable, two unlikely, but conceivable.

Many pious persons think that marriage with a deceased
 wife's sister is contrary to Divine law. Could not money be
 dedicated to propagate that view and influence a change of law
 believed, however erroneously, to be contrary to religion, and to
 sanction incest?

The Society of Friends is, I believe, opposed to war and all
 assistance in military operations. In a time of national danger,
 some patriot might think it desirable to convert them from this
 principle, and give money for that purpose.

A section of the Covenanters in Ireland decline to vote at
 Parliamentary elections, as being contrary to their religious
 convictions. At a political crisis, some strenuous and devout
 politician might think it a duty to found a propaganda against
 what he might think a misleading and dangerous religious
 tenet.

The few authorities indirectly touching the subject point to
 the conclusion I have arrived at.

In *West v. Shuttleworth* (1) a bequest to promote knowledge
 of the Catholic Christian religion among the poor and ignorant
 inhabitants of Swale Dale and Wenston Dale was supported.
 Mr. Bickersteth argued against its validity as intended for
 proselytizing purposes against the Established Church. The

(1) 2 M. & K. 684 (1835).

judgment takes no notice of this argument, which, it will be noted, was not that proselytism was intrinsically non-charitable, but that it was directed against the State Church. K. B. Div.
1910.
ATTY.-GEN.
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BECHER.

In *Thornton v. Howe* (1), a gift for the propagation of the sacred writings of Joanna Southcott, a missionary purpose, was held valid—a strong instance of the impartial neutrality of the Court, when the evangel of that poor visionary is considered. Similarly in *Pare v. Clegg* (2), a gift to disseminate the doctrines of Owen was supported. Eleven years before, in 1850, a gift to vindicate the sufficiency of natural theology without revealed religion was disallowed as inconsistent with Christianity: *Briggs v. Hartley* (3). Gibson, J.

In *Hunter's Case* (4), a gift to support the Evangelical section of the Church of England was held valid. The case was reversed in the House of Lords [1899], A.C. 309; but as pointed out by Buckley, J., in *Laurie v. Attorney-General* (5), the general principle was adopted. In *Re Delmar* (6) the bequest was to the Protestant Alliance or kindred institutions "having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty against the advance of Popery." The validity of the bequest was not disputed. The object, though described as defence, was highly controversial. *Re Scowcroft* (7) gives no help, as the only propagandist element related to conservative principles, not obviously a purpose merely charitable. The only direct case of a bequest for proselytizing a particular faith that I can discover is *Re Fearn's Will* (8), where the lawfulness of a gift to the Society for Propagating the Gospel among the Jews was assumed without question. The only other reference to this Society that I have found is in *Pemsel's Case* (9), where at p. 565 Lord Bramwell asks, "What of a trust for the conversion of the Jews? Is that a charitable purpose?" The Jews in law stand in the position of Protestant Dissenters under

(1) 31 Beav. 14 (1862).
 (2) 29 Beav. 589.
 (3) 19 L. J. Ch. 416 (1850).
 (4) [1897] 2 Ch. 105.
 (5) [1904] 1 Ch. at p. 50.

(6) [1897] 2 Ch. 163.
 (7) [1898] 2 Ch. 638.
 (8) 27 W. R. 392.
 (9) [1891] A. C. 531.

K. B. Div. the Statutes above mentioned. If a bequest for their conversion
 1910.
 ATTY.-GEN. is good, it would seem that a gift to propagate Trinitarian Christi-
 v. anity among non-Trinitarian dissenters must likewise be valid.
 BECHER. It seems difficult, if not impossible, to draw the line between the
 Gibson, J numerous differences of dogma separating the various branches of
 the Christian Church, and to lay down that missionary effort is
 legitimate in one case and not in another.

No argument was suggested by counsel for the Society based on the few remaining disabilities still affecting Roman Catholics, such as those relating to religious orders, the Protestant character of the Sovereign and his Irish Viceroy, and prohibition of Papal jurisdiction, illustrated by such cases as *O'Keefe v. Cullen* (1) and *De Themmines v. De Bonneval* (2). I have not therefore found it necessary to consider the validity or weight of any such possible argument. My judgment rests on the broad principles applicable to all lawful religious charities.

Solicitor for the informant: *The Solicitor of Inland Revenue.*

Solicitors for the defendants: *Webb, Scott, and Seymour.*

J. G. T.

(1) I. R. 7 C. L. 319.

(2) 5 Russ. 288.

THE KING (KATE DONOGHUE AND OTHERS) v. THE JUSTICES OF COUNTY CORK (1). K. B. Div.
1910.

Jan. 19.

Justices—Bias—Personal ill-will towards defendants—Securities for good behaviour—Certiorari—Costs.

Summonses were issued on the complaint of the District Inspector, Royal Irish Constabulary, against three persons named D., members of the same family, as defendants, charging them with obstructing the police, and calling on them to show cause why they should not enter into recognizances to be of good behaviour. The summonses were heard before two Justices. The defendants objected to one of the Justices, B., adjudicating on the ground that a bad feeling existed between him and them. B. insisted on adjudicating; and orders were made requiring the defendants to enter into recognizances to be of good behaviour. A conditional order for a writ of *certiorari* to quash the orders of the Justices was obtained by the defendants, grounded on affidavits made by them alleging that bad feeling had for years existed between the D. family and B., and that on the day after the orders had been made by the Justices, B. was overheard to say that he would not leave any member of the D. family in the district. Cause against making the conditional order absolute was shown on behalf of the Crown, but no cause was shown by B. individually, and he did not deny the allegations in the defendants' affidavit.

Held, that the conditional order for a writ of *certiorari* should be made absolute.

Held, also, that B. should pay the costs of the defendants in the *certiorari* proceedings.

CERTIORARI.

A summons was issued on the complaint of the District Inspector of the Royal Irish Constabulary against Mrs. Kate Donoghue, one of the prosecutors herein, complaining that she did unlawfully make use of abusive and threatening language towards one Sergeant Robert Anderson while in the execution of his duty as a constable, and did seriously obstruct and hamper him in the discharge of such duty, and requiring her to appear as defendant at Roscarbery Petty Sessions, to show cause why she should not be bound over to keep the peace and be of good

(1) Before LORD O'BRIEN, L.C.J., MADDEN and WRIGHT, JJ.

K. B. Dir. 1910. *THE KING (DONOGHUE) v.* behaviour. Summonses of a similar nature were issued against John Donoghue and Ellen Donoghue, the other prosecutors herein, who were the son and daughter of Mrs. Kate Donoghue.

JUSTICES OF CORK.

The summonses came on for hearing on the 30th June, 1909, before two Justices, Mr. Arthur Deane (Chairman) and Mr. Edward Barry. Evidence was given by Sergeant Anderson that the defendants had used abusive language to him, and had obstructed him in the discharge of his duty, and prevented him supervising the licensed premises of the defendant, Kate Donoghue. Orders were made by the Justices requiring Kate Donoghue to enter into a recognizance in the sum of £10, with two sureties in the sum of £5 each, to be of good behaviour towards all His Majesty's subjects, and especially towards Sergeant Anderson, requiring John Donoghue to enter into a recognizance in the sum of £5, with two sureties in the sum of £2 10s. each, to be of like good behaviour, and requiring Ellen Donoghue to enter into a like recognizance to be of like good behaviour.

The prosecutors obtained a conditional order for a writ of *certiorari* to bring up and quash these three orders on the ground (*inter alia*)—"That one of the magistrates, to wit, Edward Barry, who sat, heard, and decided the cases, was interested in the prosecution and adjudication, and was biassed, partial, hostile, and prejudiced towards the prosecutors, Kate, Ellen, and John Donoghue."

Affidavits for the purpose of obtaining the conditional order had been made by each of the prosecutors. Kate Donoghue, in her affidavit, stated that about six years previously bad feeling had arisen between her family and Mr. Barry owing to the trespass of her fowl on Mr. Barry's land, and that since then the worst possible relations had existed between them. That on the hearing of the charge against her, her counsel objected to Mr. Barry adjudicating upon the cases against her and her son and daughter, owing to the bad relations that existed between him and them, and that Mr. Barry used violent language to counsel, and insisted on adjudicating. Deponent alleged that she did not get a fair trial upon the hearing of the

summons, as Mr. Barry was openly and avowedly hostile to her and her family, and that the object of the proceedings was to furnish material for an objection to the renewal of her license. Ellen Donoghue, in her affidavit, stated that she charged and believed that Mr. Barry upon the hearing of the charge against her was grossly biassed, and that she did not get a fair trial. John Donoghue, in his affidavit, stated that he believed he did not get justice or fair play from Mr. Barry upon the hearing of the charge. His affidavit further stated:—"On the evening of the 1st July, 1909, Mr. Barry was in his garden adjoining my mother's holding. I heard him say to some person he was talking to, 'As sure as I'm living I will not leave any member of the Feheens in Bohonagh,' Feheens being the nickname generally applied to my family."

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Cause was shown by the Crown against making the conditional order absolute. The conditional order had been served on Mr. Barry, but no cause was shown by him individually, nor did he make any affidavit. Application was made to the Court on behalf of the prosecutors on the 22nd November, 1909, to make absolute the conditional order, when the Court adjourned the case in order that Mr. Barry might have an opportunity of filing an affidavit. No affidavit was filed by Mr. Barry, and it was stated, on the present hearing of the application, that he had declined to make an affidavit.

Norwood, for the prosecutors:—

The uncontradicted evidence shows that Mr. Barry had a strong personal bias against the Donoghues. He insisted on adjudicating notwithstanding their objection. The orders cannot therefore stand. [He referred to *Reg. (Burke) v. The Justices of Galway* (1).]

Dudley White, K.C., and *John Linehan*, for the Crown:—

To disqualify a Justice from acting there must be a real bias, a mere possibility of bias is not sufficient: *The Queen v. Rand* (2)

(1) 31 I. L. T. R. 160.

(2) L. R. 1 Q. B. 230, at p. 233.

K. B. Div. per Blackburn, J.: The King (De Vesci) v. Justices of Queen's County, per Lord O'Brien, L.C.J. (1); The King (Taverner) v. Justices of County Tyrone (2). There is no case in which mere general personal ill-will has been held sufficient to disqualify. Where no member of the Court is either pecuniarily interested or is actually or virtually a prosecutor in the case, it is difficult to prove bias: *Encyclopædia of the Laws of England*, 2nd ed., vol. ii., p. 177; *Brookes v. Earl Rivers* (3). The bias to disqualify must be a bias in the matter to be litigated: *Reg. v. Mayor, &c., of Deal* (4). There must be a *lis*, a controversy *inter partes*: *Boulter v. Kent Justices, per Lord Herschell* (5); *The King v. Howard* (6); *The King (Findlater) v. Justices of Dublin* (7). An application to compel a person to give sureties for good behaviour is not such a *lis*: there is no other party, unless the entire public can be regarded as the other party—a view which Lord Herschell in *Boulter's Case* (5) refused to entertain.

LORD O'BRIEN, L.C.J.:—

We have considered this case very carefully, and have come to the conclusion that the conditional order for the writ of *certiorari* must be made absolute. There is no doubt that very bad relations existed between Mr. Barry (the magistrate to whom bias is imputed) and the Donoghues. This is admitted. The summonses against the Donoghues were heard on the 30th June. Mr. Barry sat on the bench, and, although objected to by counsel for the Donoghues, he insisted on adjudicating. When the objection was made, he certainly used strong language, but I confess I do not attach much importance to that. What he said the next day is important. John Donoghue states in his affidavit, and this is not contradicted:—"On the evening of the 1st July, 1909, Mr. Barry was in his garden adjoining my mother's holding. I heard him say to some person he was talking to, 'As sure as I'm living I will not leave any member of the Feheens in Bohonagh,' Feheens being the nickname generally applied to

(1) [1908] 2 I. R. 285, at p. 294.

(2) [1909] 2 I. R. 763.

(3) *Hard.* 503.

(4) 45 L. T. (N. S.) 439.

(5) [1897] A. C. 536, at p. 569.

(6) [1902] 2 K. B. 363.

(7) [1904] 2 I. R. 75.

my family.” That is to say, Mr. Barry’s feeling was so strong against this family that he would continue the course he had pursued before : that in fact his hostility towards them, whether in or out of Court, had been and would be equally unrelenting. We gave Mr. Barry every opportunity of explaining this statement, and showing that he was not prejudiced against the Donoghues the day before, when making the orders now impugned. When the motion first came on, we were of opinion that we ought to give Mr. Barry an opportunity of making an affidavit. We accordingly gave him such an opportunity, but he has made no affidavit whatsoever. He has expressly declined to do so.

K. B. Div.
1910.
THE KING
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Lord O’Brien,
L.C.J.

What then is the test we should apply ; what ought to be the principle of our decision ?

I adhere to what I said in *The King (Taverner) v. Justices of County Tyrone* (1), and my brother Wright, who was not a party to the decision—my brothers Gibson, Madden, and Kenny were—authorizes me to state that he agrees with it. I then said (p. 768) :—“ A passage has been cited from the judgment of a distinguished Judge, Lord Esher, in the case of *Eckersley v. Mersey Docks and Harbour Board* (2). He is reported to have said (pp. 670, 671) : ‘ When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer, because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges, that not only must they not be biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed.’ That, in my opinion, goes too far. It makes the mere suspicions of unreasonable persons a test of bias. I think that the judgment was not a considered one, and that Lord Esher made use of some loose expressions. We decline, on a consideration of the cases, to go

(1) [1909] 2 I. R. 763.

(2) [1894] 2 Q. B. 669.

K. B. Div. so far as that very eminent Judge. There must, in the words of
 1910. Blackburn, J., be a 'real likelihood' of bias: *The Queen v.*
THE KING *Rand* (1). In *The King (De Vesci) v. Justices of Queen's Co.* (2), I
 (DONOGHUE) expressed myself as follows:—"By "bias" I understand a real likeli-
v. hood of an operative prejudice, whether conscious or unconscious."
 JUSTICES OF
 CORK. There must, in my opinion, be reasonable evidence to satisfy us
 Lord O'Brien, that there was a real likelihood of bias." I do not think that the
 L.C.J. mere vague suspicions of whimsical, capricious, and unreasonable
 people should be made a standard to regulate our action here.
 It might be a different matter if suspicion rested on reasonable
 grounds—was reasonably generated—but certainly mere flimsy,
 elusive, morbid suspicions should not be permitted to form a
 ground of decision.

In the present case was there not a real likelihood of bias
 plainly shown by the words spoken almost immediately after
 the hearing before the magistrates had taken place, and, more
 especially, having regard to the fact that Mr. Barry was given
 an opportunity of making an affidavit, and did not do so? The
certiorari should, in my opinion, be granted.

MADDEN and WRIGHT, JJ., concurred.

Norwood:—

Mr. Barry should pay our costs of the present proceedings.
 No doubt he has not shown cause against the order, but it was
 his action in the matter made the proceedings necessary, and
 although invited by the Court to explain his conduct, he has not
 attempted to do so.

LORD O'BRIEN, L.C.J.:—

We think Mr. Barry should pay the costs.

Solicitors for the prosecutors: *D. W. O'Donovan*.

Solicitor for the Crown: *Malachy Kelly*.

J. G. T.

(1) *L. R. 1 Q. B.* 230, at p. 233.

(2) [1908] 2 *L. R.* 285, at p. 294.

THE TOAMES CO-OPERATIVE AGRICULTURAL AND
DAIRY SOCIETY, LIMITED, v. FOLEY AND HART-
NETT (1).

Appeal.
1910.

Jan. 27, 28.

(1909. No. 1660.)

Principal and surety—Fidelity bond—Condition—Resignation and re-appointment of principal—Appointment whether renewable—Discharge of surety.

On the appointment, in 1901, of B. by the plaintiff Society as their store-clerk, B. and the defendants entered into a bond with the plaintiff Society for his fidelity "during such time as he continues to hold the same, in virtue of his present appointment or of any renewal thereof, if such office is of a renewable character."

Pursuant to a resolution passed by the plaintiff Society, that any employee seeking an increase of salary should give one month's notice of resignation, B., who sought an increase of salary, gave a month's notice of resignation and was re-appointed, his salary being increased.

Held, that the employment was not renewable in its character within the meaning of the bond, and that the sureties were not liable for defalcations after the re-appointment.

APPEAL by the defendant, John J. Foley, from an order of the King's Bench Division (Johnson and Boyd, JJ.), dated the 15th December, 1909, setting aside a verdict for the defendants directed by Kenny, J., at the trial, and the judgment for the defendants thereon, and ordering a new trial of the action.

The action was brought on a bond for £100, dated the 12th May, 1902, entered into by the defendants as sureties for one Edward Baldwin, who was employed as a clerk by the plaintiffs, conditioned for fidelity in his employment. It was admitted that Baldwin had committed defalcations to the amount of £82 16s. 5d.

The defence was, first, that the liability of the defendants under the bond determined in June, 1903 (before any of the defalcations), at which date it was contended that Baldwin resigned and was newly appointed; and, secondly, that Baldwin's

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal.
1910.

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position had been altered at that time to such an extent as to discharge the sureties.

The plaintiffs were a limited company duly registered under the title of "The Toames Co-operative Society, Limited." Originally they were a creamery, and carried on in addition the sale of seeds, hardware, and provisions.

On the 5th November, 1901, they appointed Baldwin store-clerk, he having answered an advertisement for that position, and having been selected. Baldwin and his sureties, the defendants, John J. Foley and Denis J. Hartnett, executed a fidelity bond to the Society in the form No. (1) (b), Schedule III, to the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), the material part of the condition being as follows:—

"The condition of the above-contained bond is, that if the said Edward W. Baldwin faithfully execute the office of clerk to the said Society, during such time as he continues to hold the same in virtue either of his present appointment or of any renewal thereof, if such office is of a renewable character, without wasting, &c. . . ., then the above-contained bond shall be void and of no effect, but otherwise it shall continue in full force."

Prior to Baldwin's appointment the Society had, on the 21st December, 1900, passed the following resolution:—"That we demand from any of our employees applying for an increase of salary a month's notice of resignation previously."

In May, 1903, Baldwin applied for an increase of salary, and on the 4th May, 1903, gave a month's notice of resignation. The Society advertised for applicants, but no one having answered the advertisement except Baldwin, who sought to be appointed at an increased salary, they re-appointed him at £1 a week (this being a slight increase on his former pay), it being a term of the new appointment that he should discharge certain additional duties in connexion with a poultry business which the Society had started. No question on these additional duties was substantially pressed in the Court of Appeal, the arguments being exclusively directed to the re-appointment.

Kenny, J., was of opinion that the appointment of Baldwin, during the continuance of which his fidelity was guaranteed by

the defendants, terminated in June, 1903 (on the expiration of his notice of resignation); that the bond did not apply to what his Lordship regarded as a new appointment as from that date, and he accordingly directed a verdict for the defendants.

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Serjeant Moriarty, K.C., and Conner, K.C. (with them Norwood),
for the defendant Foley :—

The bond is in the form prescribed by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), sect. 47, Sched. III., Form (1) (b). The resignation and re-appointment constituted a new employment at a different salary and with increased duties, and the suretyship was terminated. It only lasted, according to the terms of the condition of the bond, as long as Baldwin held office by virtue of his original appointment: *Bamford v. Iles* (1); *North-Western Railway Co. v. Whinray* (2). In *Holmes v. Brunskill* (3) Cotton, L.J., says (p. 505):—
“The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted; and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury, as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in *The Croydon Gas Co. v. Dickenson* (4).”
This case makes it clear that where there is an alteration the

(1) 3 Ex. 380.

(2) 10 Ex. 77.

(3) 3 Q. B. D. 495.

(4) 2 C. P. D. at p. 51.

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question whether it is material is for the Court and not for a jury to determine.

Tayleur v. Wildin (1) is to the same effect. It was distinguished, but not disapproved of, in *Holme v. Brunskill* (2), and on the question of suretyship is still an authority in Ireland.

In *Augero v. Keen* (3) the wording of the bond was different from what we have here. It was to subsist "during such times as he" (the rate-collector) "shall continue in his said office, whether by virtue of his said appointment or of any re-appointment thereto": *Skillett v. Fletcher* (4) was a case where it was held that there was no change in the office, *Martin, B.*, recognizing at the same time the rule laid down in *Arlington v. Merricke* (5), that "any substantial change in the office of the principal without the sureties' consent discharges them from their liability." He says that rule has been followed ever since. So in *Frank v. Edwards* (6) there was no termination of the original employment.

A. M. Sullivan, K.C., and *Timothy Sullivan*, for the plaintiffs :—

As yet there has been no trial of the action—no investigation of the material facts—but simply a ruling that the plaintiffs could not, in any event, succeed. The Society's resolution of 21st December, 1900, merely required a conditional resignation. What is the result of a resignation, in pursuance of that resolution, merely to qualify the applicant to get an increased salary? It is just the same as the old question of notice to quit with a view to re-adjustment of rent; when it was held, time after time, that the old tenancy continued with a variation in the rent.

The reasoning in *Frank v. Edwards* (6) is that so long as the employee continues in the same office, though with a variation of salary, the guarantee continues. That is identical with this case. The dominant note in the bond is "so long as he continues in office, or any renewal thereof." "Renewal" is a word which

(1) L. R. 3 Ex. 303.

(2) 3 Q. B. D. 495.

(3) 1 M. & W. 390.

(4) L. R. 2 C. P. 469.

(5) 2 Saund. 403.

(6) 8 Ex. 214.

has not any technical meaning: *The King (Wright) v. Chairman and Justices of Cork* (1), a case turning on the Licensing Act, 1902 (2 Edw. 7, c. 18).

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Bamford's Case (2) was the case of an appointment for a year certain, and the bond contained no reference to any renewal. In *Whinray's Case* (3) the bond recited that the employment was at a fixed salary, and it was held that that could not be changed into a commission behind the back of the surety.

THE LORD CHANCELLOR:—

We are all of opinion that the judgment of the King's Bench Division cannot be sustained. Boyd, J., says that it was the same office at a different salary. The question arises on the legal construction of the contract into which the surety entered, the condition of the bond, and a few facts not in dispute. Mr. Baldwin was appointed clerk to the plaintiffs. There was a resolution passed by the plaintiffs on the 21st December, 1900, "That we demand from any of our employees applying for an increase of salary a month's notice of resignation previously." That was a reasonable rule, as it allowed them to seek for a new man who might act at the old salary. Mr. Baldwin gave notice to resign. The Society advertised for tenders, and, there being no applicant except Baldwin, he was appointed at an increased salary. The condition of the bond is—"The condition of the above-contained bond is that, if the said Edward W. Baldwin faithfully execute the office of clerk to the said Society, during such time as he continues to hold the same in virtue either of his present appointment." On that branch of the condition, is the surety liable during the present employment? The second branch is relied on, "or any renewal thereof." But you cannot stop there. It proceeds, "if such office is of a renewable character."

This was not an office of a renewable character. These words apply to an office of a character which is renewable under the terms of the employment. It seems to me that the condition of the bond does not apply.

(1) [1906] 2 I. R. 349.

(3) 10 Ex. 77.

(2) 3 Ex. 380.

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1910.
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The Lord
Chancellor.

Tayleur v. Wildin (1), recognized in *Holme v. Brunskill* (2) and acted on in many other English cases, decided that where a guarantee was given for the rent of a farm in the occupation of a yearly tenant, and notice to quit was served, the tenancy was determined on the expiration of the current year; that a waiver of the notice created a new tenancy, taking effect on the expiration of the old one, and that the guarantee applied only to the tenancy which existed at the time when it was given. That is a binding authority on us. Of course in Ireland the effect of a notice to quit is in certain cases made different by statute; but in all other respects *Tayleur v. Wildin* (1) is binding upon us.

I am of opinion that the decision of the King's Bench Division cannot be sustained, and that the appeal must be allowed.

HOLMES, L.J.:—

I concur. This case turns entirely on the language of the bond. At the time the bond was executed, Baldwin had been appointed clerk. The bond is to be in force during such time as he shall continue to hold the same (*i.e.* the office of clerk), “in virtue either of his present appointment, or of any renewal thereof, if such office is of a renewable character.” That is the condition of the bond. It is perfectly plain to my mind that he does not at present hold that office by reason of the appointment made prior to the execution of the bond, for he had given (I care not for what reason) notice to leave that employment, which was accepted; and tenders for the office by new applicants were invited by advertisement. It so happened that nobody else applied, and Baldwin was appointed. But is this new appointment one to which the bond applies? It is said the bond also covers “any renewal” of the office. In one sense of the word every office may be renewed. You may dismiss a person in your employment and take him back, or he may resign and withdraw his resignation. But here, to make the sureties continue to be liable, there must not merely be a renewal of the office, but the office must be of a renewable character.

In this case the party himself has terminated his employment. The view taken by Mr. Justice Kenny was, in my opinion, correct, and we cannot uphold the decision of the King's Bench Division which set aside the verdict directed by him.

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CHERRY, L.J. :—

I concur. There are two branches of Mr. Sullivan's argument. First, he contends that there was no new contract between Mr. Baldwin and the Society, that the old appointment continued notwithstanding the formal resignation and re-appointment of Mr. Baldwin, and that the sureties were not discharged. I think that argument is completely answered by *Tayleur v. Wildin* (1), though that case does not in some respects apply in this country by reason of the special legislation regarding Irish land. Two points were there decided : one, as regards the effect of a notice to quit not acted upon, has no application in Ireland. The other, namely, that a contract of suretyship does not extend to the renewal of a contract, on exactly the same terms as the original contract, is not affected by our special land legislation. On this latter point the decision is unquestioned in Ireland.

Here it must be admitted that there was at least a technical change in the terms of the employment, and therefore, if it were not for the provision in the bond as to a renewal, the sureties, on the authority of *Tayleur v. Wildin* (1), would be discharged. The second branch of Mr. Sullivan's argument is based upon this last provision. The condition of the bond is "That if the said Edward Baldwin faithfully execute the office of clerk to the said Society during such time as he continues to hold the same in virtue of his present appointment, or of any renewal thereof, if such office is of a renewable character." It is urged that the re-appointment was a mere renewal of the original appointment, and therefore that the bond by its very terms applies to the case. But we cannot ignore the words, "if such office is of a renewable

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character." That is not the case here. An indefinite appointment, not for any specified duration of time, cannot be described as being of a renewable character; and I think the Judge at the trial was right in directing a verdict for the defendants.

Solicitor for the plaintiffs: *Maurice Healy.*

Solicitors for the defendant Foley: *Dealy and White.*

- W. G.

IN THE MATTER OF AN ARBITRATION BETWEEN SMITH *K. B. Div.*
AND THE BELFAST CORPORATION (1). 1909.

Dec. 3, 7.

Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 274—Condemnation and destruction of unsound food—Consequential trade loss—Arbitration—“Full compensation”—Meaning of—Award—Ambiguity—Finding that owner of food was not himself in default—No finding as to soundness or unsoundness of food when seized—Duty of arbitrators—Refusal to segregate items composing sum awarded—Jurisdiction of Court to send back award.

The Public Health (Ireland) Act, 1878, s. 274, enacts that “where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the sanitary authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in the manner provided by this Act.”

Held, that the expressions “damage” and “full compensation” in this enactment do not include trade loss caused to the owner of an article intended for the food of man by reason of the publicity of proceedings brought by a sanitary authority under s. 133 of the Act to have such article of food condemned as unsound; and where there is evidence that an amount awarded as compensation under the section includes such trade loss, although the award does not so state, the Court has jurisdiction, on a motion to set aside the award, to remit it to the arbitrators to state the amount awarded as compensation for trade loss.

The carcase of a pig having been seized and condemned under a magistrate's order as unsound under the Public Health (Ir.) Act, 1878, ss. 132 and 133, a dispute between the owner of the carcase and the sanitary authority, as to the fact of damage and amount of compensation, was referred to arbitration under section 274 of the said Act. At the arbitration evidence was received, subject to objection, as to the trade loss sustained by the owner by reason of the publicity of the condemnation. The arbitrators were requested by counsel for the sanitary authority to state in their award what amount (if any) of the compensation represented such trade loss; and also whether they found that the carcase was sound when seized or not. The award did not state either of these facts.

(1) Before GIBSON, J.

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The sum awarded as compensation exceeded the amount previously claimed in writing by the owner in respect of items other than loss of trade, but this "claim" was not referred to in the award, nor was it shown to have been before the arbitrators.

On a motion by the sanitary authority to set aside the award, *held* (1) that trade loss could not be recovered as damages; (2) that the arbitrators ought to have complied with the requisition to state their findings specifically; (3) that the owner's claim for compensation was receivable in evidence upon the motion; (4) that on the evidence the Court was at liberty to infer that compensation had been awarded beyond the jurisdiction of the arbitrators (1); (5) that the Court had jurisdiction to remit the award to be corrected by stating specifically the findings as to soundness and as to trade loss.

Walshaw v. Brighthouse Corporation ([1899] 2 Q. B. 286) and *Brierley Hill Local Board v. Pearsall* (9 A. C. 595) discussed.

Quære as to the jurisdiction of the arbitrators to determine the question upon which the liability of the sanitary authority depended, viz., the soundness or unsoundness of the carcase when it was seized?

MOTION to set aside an award made in an arbitration held in pursuance of sections 216, 217, and 274 of the Public Health (Ir.) Act, 1878.

On the 2nd March, 1909, one of the officials of the Belfast Corporation, acting under the powers conferred on the said Corporation and its officers by the Public Health (Ir.) Act, 1878, seized the carcase of a pig, the property of William Smith, on the ground that it was unsound and unfit for human food. On the 4th March the said carcase was, at the instance of the said Corporation, condemned as unsound by a Justice of the Peace, and an order was made for its destruction. On the 5th March William Smith sent to the Town Clerk of Belfast a claim for £225 16s. 9d. compensation for the seizure and destruction of the said carcase. The amount thus claimed was composed of the following items:—

Price of pig	£5 13 4
Expenses on same	0 3 5
Loss of trade through publicity of Police Court proceedings	200 0 0
Costs and expenses of experts	20 0 0
	£225 16 9

(1) For a case in which the Court declined to draw such an inference, see *Falkingham v. Victorian Railways Commissioner* [1900] A. C. 452. [REP.]

On the 25th March the Town Clerk replied that, as the Corporation were satisfied from the report of their officers that the carcass in question was unsound and unfit for food, the Corporation refused to entertain any claim for compensation in reference to it.

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On the 31st March, 1909, William Smith, by writing, appointed Robert N. Boyd to act as arbitrator on his behalf to ascertain the fact of damage done him, and to assess the amount of compensation payable to him under sections 216, 217, and 274 of the Public Health (Ir.) Act, 1878, by the Corporation for the seizure and destruction of the said pig, "which said pig was, as to its flesh, sound and fit for the food of man, and it being a matter in regard to the said pig and the possession thereof in which he himself" (*i.e.*, William Smith) "was not in default."

On the 15th April the Corporation, under its seal, appointed John M'Caw an arbitrator to act on their behalf in the matter. This appointment was made "under protest and without admission of any liability whatsoever."

The arbitration was held on the 21st, 22nd, and 24th May, an umpire having been previously appointed by the arbitrators. The following account of the proceeding before the arbitrators is taken from an affidavit sworn by the solicitor for the Belfast Corporation:—"Counsel for the Corporation appeared and denied liability. After hearing evidence as to the seizure of the said carcass, and as to its soundness or unsoundness, and as to its value, counsel for William Smith tendered a newspaper as evidence as to the publication of a report of the proceedings before the Justice when the order for destruction was made; and tendered evidence as to loss sustained by William Smith in his business by reason of such publication. Counsel for the Corporation objected to the arbitrators receiving such evidence, and submitted that the arbitrators had no power to award damages for loss of trade caused by such publication . . . The arbitrators admitted the evidence. Counsel for the Corporation requested the arbitrators to find specifically whether the carcass in question was sound or not, and to set forth such finding in their award; and also to segregate the amount of any damage they might award for loss caused to William Smith's trade from the remainder of the damage claimed."

On the 14th June the arbitrators made and published their

K. B. Div. award, which, after reciting the various steps in the proceedings
 1909. (with the exception of the claim for compensation made on the
In re 5th March by William Smith, to which no reference was made),
 SMITH AND concluded as follows:—"We, John M'Caw and Robert N. Boyd,
 BELFAST CORPORATION having taken upon ourselves the burden of the said arbitration,
 and having duly weighed and considered the several allegations
 of the said parties and their witnesses, and the proofs, vouchers,
 and documents laid before us, do hereby make and publish this
 our award in writing, of and concerning the said matters so referred
 to us as aforesaid as follows, that is to say:—We award and find
 that the said William Smith, by reason of the exercise of the
 powers of the Corporation under the Public Health (Ir.) Act,
 1878, in seizing and destroying the carcase of the said pig, and in
 obtaining the order of the magistrate as aforesaid, has sustained
 damage without being himself in default, and that the sum of
 £32 is the amount of compensation in respect of such damage,
 and we direct and order that the Corporation do pay to the said
 William Smith his costs and charges, of and consequent upon,
 this reference and award, and that the Corporation do abide their
 own costs."

The award also directed the Corporation to pay the fees and charges of the arbitrators and umpire, and £12 12s., the costs of the award.

On the 19th November, 1909, the submission to arbitration was, on motion by the Corporation, received and made a rule of Court.

The claim made by William Smith on the 5th March was not referred to in any of the affidavits filed on behalf of either of the parties; and there was no evidence to show that it had been put in evidence at the arbitration.

On the 11th November, 1909, William Smith commenced an action upon the award, and on the 22nd November the Belfast Corporation entered an appearance in the action, but no further steps were taken therein pending the result of the motion to set aside the award.

On the 26th November, 1909, the Corporation served notice of motion to have the award set aside on the following grounds:—

"1. That the said award is uncertain in that it does not find

whether the carcase mentioned therein was or was not sound or fit for human food at the time when it was seized; and does not state whether the sum awarded thereunder was assessed on the basis of its soundness or unsoundness at such time.

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"2. That the arbitrators had no power to award any damages in respect of the said carcase until they found as a fact that the said carcase was sound when seized; and that the said award contains no such finding.

"3. That the said arbitrators have acted *ultra vires* in awarding damages in respect of matters which were not legally the subject of compensation, to wit, loss caused to the complainant's trade by reason of the publication of the Police Court proceedings."

C. L. Matheson, K.C. (with him *T. Harrison*), for the Belfast Corporation:—

The award is bad. It should contain a finding by the arbitrators on the question whether the carcase was sound when seized or not: *Walshaw v. Brighthouse Corporation* (1); *Brierley Hill Local Board v. Pearsall* (2). Unless meat intended for human food is proved to have been sound when seized, the owner has no legal right to compensation. No legal loss is sustained by reason of the destruction of unsound food, because the sale of such food is forbidden by law. On the other hand, the arbitrators had no jurisdiction to determine the question whether Smith was or was not himself in default. That is a question of law, the answer to which must depend upon the arbitrators' findings of fact. The finding that Smith was not himself in default is ambiguous. It may mean that, although the carcase was in fact unsound, Smith was unaware of the fact, and was morally blameless; but in a prosecution under sections 132 and 133 of the Public Health (Ir.) Act, 1878, against the owner of unsound food, it is unnecessary to prove that the defendant had personal knowledge of the condition of the food: *Blaker v. Tillstone* (3). Section 274 of this Act is *in pari materia* with sections 132 and 133, and the word "default" in section 274 should receive a similar construction.

(1) [1899] 2 Q. B. 286. (2) 9 A. C. 595. (3) [1894] 1 Q. B. 345.

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The amount awarded as compensation is excessive. The arbitrators had no jurisdiction to award damages for trade loss caused by the publicity of the proceedings in connexion with the condemnation of the carcase in question. It is true that such damages were awarded in *Walshaw v. Brighthouse Corporation* (1); but the point was not argued in that case, nor was it referred to by any of the Judges who decided the case. I submit that the words "full compensation" in section 274 mean only a full equivalent for actual loss sustained by compulsory seizure and destruction of any article of food, but do not cover unliquidated damages such as might be awarded in an action for wrongful seizure. The fact that the arbitrators have not segregated the items composing the sum awarded as compensation, although they were requested to do so, is suggestive of an attempt on their part to evade the limits of their jurisdiction. The total amount of Smith's claim (2), exclusive of the sum claimed for loss of trade, was only £25 16s. 9d., whereas the amount awarded as compensation is £32; it is, therefore, clear that part of the latter sum represents compensation for loss of trade.

Ronan, K.C., and D. M. Wilson, K.C. (with them H. Thompson),
for William Smith:—

As to the duty of a Court of law in construing an award, "Courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected": *per* Coleridge, J., in *Templeman and Reed* (3); see also Russell on Arbitration (7th ed.), at p. 530. Even if the arbitrators have made a mistake, the award cannot be set aside unless the error be apparent on the face of the award: *Hagger v. Baker* (4). The award in this case does not show any error in form; it follows the form in the Encyclopædia

(1) [1899] 2 Q. B. 286.

(2) The reception of this document was objected to by counsel for William Smith on the ground that it was not in evidence. The point is dealt with in their argument, *infra*, p. 291, and in the judgment of Gibson, J., *infra*, p. 293. [REP.]

(3) 9 Dowl. 962, at p. 966.

(4) 14 M. & W. 9.

of Forms and Precedents, vol. x., p. 283. The Public Health (Ir.) Act, 1878, section 274, enacts that the arbitrators shall ascertain the "fact of damage" and the "amount of compensation"; the section also enacts that the party injured shall be entitled to "full compensation." These latter words were very wide, and "must include any pecuniary loss which a man suffers when he is not in default": *per* Lord Esher, M.R., in *In re Bater and Mayor, &c., of Borough of Birkenhead* (1). This passage was cited with approval by A. L. Smith, L.J., in *Walshaw v. Brighouse Corporation* (2). We submit that the words "full compensation" are wide enough to cover compensation for loss of trade caused by the publicity of proceedings in connection with the seizure and condemnation as unsound of an article of food. Damages of that kind were awarded in *Walshaw v. Brighouse Corporation* (2), and the award was not challenged on that ground; but even if such loss is not a proper subject for compensation under the Public Health (Ir.) Act, there is no evidence in the present case to show that compensation has been awarded for loss of that kind. The claim made by Smith on 5th March is not mentioned in the award, and is not shown to have been put in evidence at the arbitration. It is, therefore, quite possible that the sum awarded was intended only as compensation for the loss of the carcase in question, and for Smith's costs in connection with the proceedings before the Justices who condemned the carcase as unsound. Compensation for expenses of that kind can be awarded with propriety: *In re Bater and The Mayor, &c., of Borough of Birkenhead* (1); *Walshaw v. Brighouse Corporation* (2).

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With regard to the objection that the award does not contain a finding upon the question whether the carcase was sound when seized or not, no doubt there was a finding upon that point in *Walshaw v. Brighouse Corporation* (2); but that case does not decide that such a finding is necessary to the validity of the award. We admit that the words "fact of damage" in section 274 must, in a case such as this, mean damage suffered by reason of the seizure and condemnation of a carcase which is in fact sound; and if there be no jurisdiction to award damages for the

(1) [1893] 2 Q. B. 77.

(2) [1899] 2 Q. B. 286.

K. B. Div. seizure and condemnation of an unsound carcase, we submit that
 1909. the finding that Smith was not himself in default is equivalent to
In re a finding that the carcase was sound when seized, and that the
 SMITH AND award should be so construed. A finding that Smith was not
 BELFAST himself in default, regarded as an inference of law from ascertained
 CORPORATION facts, would not be binding upon the Belfast Corporation in an
 action upon the award : *Brierley Hill Local Board v. Pearsall* (1) ;
 see the speech of Lord Fitz Gerald at p. 603 of the report ; but such
 a finding does not vitiate the award. An action upon the award
 was in fact commenced by Smith, in which the Belfast Corporation
 could have disputed their liability. The present motion ought
 not to have been instituted.

T. Harrison, in reply :—

With regard to the contention that the Corporation ought to have contested their liability in the action upon the award, instead of instituting this motion, such a course would involve a great waste of public money. The Corporation is entitled to adopt the most expeditious and least expensive method of contesting the validity of the award.

If the carcase was unsound, the arbitrators finding that Smith was not himself in default is bad in law. The finding may, however, only mean that Smith was not personally to blame ; but the word “ default ” in the Public Health Act does not involve *mens rea*. As to the meaning of the words “ full compensation ” in section 274, see *Re Penny* (2), *Metropolitan Board of Works v. McCarthy* (3).

Cur. adv. vult.

Dec. 7.

GIBSON, J. :—

This is an application to set aside an award purporting to be made under section 274 of the Public Health (Ireland) Act, 1878, on the grounds (1) that it was uncertain, not finding whether the carcase therein mentioned was or was not sound and fit for human food at time of seizure ; (2) that there was no power to award damage in respect of said carcase, until it was found as a fact that the carcase was sound when seized ; (3) that the arbitrators acted

(1) 9 A. C. 595.

(2) 7 E & B. 660.

(3) L. R. 7 H. L. 243.

ultra vires in awarding damages for loss to plaintiff's trade by reason of the publication of the Police Court proceedings. The affidavits on both sides are loosely framed, and there is no affidavit from the arbitrators. A pig, Mr. Smith's property, was seized as unsound on March 2nd, under section 132, by a sanitary officer of the Corporation, and was, on March 4th, condemned by a Justice under section 133, but such condemnation was not followed by any prosecution. On March 5th Smith sent in a claim in writing asking £225 16s. 9d. compensation, made up as follows:—£5 13s. 4d., price of pig; 3s. 5d., expenses of same; £200 for loss of trade through Police Court proceedings; £20, costs and expenses of experts. Mr. Ronan objected to this document being used in evidence, as it was not referred to in any part of the arbitration documents and award, and was not shown to have been brought before the arbitrators at the hearing. I think the document cannot be excluded. The arbitrators' jurisdiction is founded on the existence of a dispute. What the dispute was appears to be a matter of fact; it cannot be ascertained from the contents of the separate *ex parte* statements contained in the instrument by which each party appoints his own arbitrator. At any rate the document is evidence against Smith as to what were the items he was claiming (irrespective of business losses), and it is not alleged that he ever gave evidence of any other figures.

At the hearing, Smith's counsel offered in evidence a newspaper report of the proceedings before the Justices on the 4th March, in order to prove business loss by reason of such publication. The evidence was objected to by counsel for the Corporation, but received. Other evidence was, it appears from Mr. Barkley's affidavit, also tendered to show the notoriety of the case, and that loss to Smith's business immediately ensued and was directly attributable to such notoriety. Whether such evidence was acted on, is left to inference. The arbitrators, in my opinion, acted wrongly when counsel for the Corporation required that any such item of damage should be segregated, in disregarding his requisition; and also in omitting from the award any specific finding as to the character of the carcase when seized. Whether the award is impeachable on this ground I

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K. B. Div. shall consider presently. The award was made on June 14th.

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It follows the language of section 274, and awards £32 as the amount of compensation for the damage sustained by Smith, "without being himself in default."

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My first duty is to construe the section, as to which counsel agree that there could be no liability for damage unless the carcase was wrongfully seized and condemned, and that the phrase "as to which he is not *himself* in default," has the same meaning as if the word "himself" was struck out. *Mens rea* does not enter into sections 132 and 133, and it could not have been intended that a morally innocent and ignorant owner of an unsound carcase, rightly condemned, should be entitled to get compensation for damage against the sanitary authority.

Next, what is "damage"? It obviously is damage which was actionable in character: *Hall v. Mayor of Bristol* (1); *Rhodes v. Airedale Drainage Commissioners* (2). Whether the section contemplates that the costs in every unsuccessful proceeding brought by a sanitary authority, where the Court has made no express order allowing or disallowing costs, should be considered as damage, I should have thought doubtful. The statute authorizes a great variety of proceedings, civil as well as criminal; proceedings may be *in rem* or *in personam*; and many of these can be brought by a person aggrieved, and by a common informer (section 251), who clearly would not be within section 274. In every prosecution *in personam* by a sanitary authority, if the prosecution fails and the Court makes no order as to costs, are such costs "damage" to be arbitrated upon? Arbitrators are obviously quite incompetent to deal with the distinction between party and party and solicitor and client costs. In *Bater's Case* (3) I suspect the costs were on a solicitor and client basis, though such costs, whether described as expenses or costs, would not be damage. It is unnecessary, however, to discuss *Bater's Case* (3) or this point further, as the question here relates not to a prosecution *in personam*, but as to whether trade loss by reason of the publicity of the proceedings before the Justice, treated as a kind of slander, is damage within the section. Such

(1) L. R. 2 C. P. 322.

(2) 1 C. P. D. 380.

(3) [1893] 1 Q. B. 679; [1893] 2 Q. B. 77.

loss in an action would certainly be remote and could not be recovered. This was so held in *Fitzgerald v. Leonard* (1) under the Margarine Act. I followed this decision in a subsequent case where the action was brought by a local retail trader in respect of a barrel of herrings, sold by a wholesale firm, and, on a new trial motion brought by the plaintiff, the Court followed *Fitzgerald v. Leonard* (1). The same view was taken in the *Bostock Cases* (2), referred to in *Mayne on Damages*, last edition, p. 234. These authorities were not cited in argument, but Mr. Ronan, relying on *Walshaw's Case* (3), where such damage was allowed, contended that "full compensation" must cover such loss. The consequence would be alarming. In an unsuccessful prosecution of a hotel, hydro, or provision firm, for nuisance from drains, for infectious disease non-notification, or otherwise, the damages might be crushing; and a sanitary authority, sooner than face such a risk, might forego its duty of prosecuting. No authority except *Walshaw's Case* (3) (where the point was overlooked, not decided) was referred to by counsel; but, since the argument, I have found some cases which seem decisive that the phrase "full compensation" cannot have the effect that counsel attribute to it. "Full costs" only means party and party costs: *Avery v. Wood* (4); "full compensation" does not extend to solicitor and client costs: *Barnett v. Eccles Corporation* (5). The Merchant Shipping Act, 1876, c. 76, enables the Board of Trade provisionally to detain a ship, and, if the detention proves to have been without reasonable and probable cause, gives the shipowner compensation for any consequent loss or damage. In *Dixon v. Calcraft* (6), it was held that loss of reputation was not loss or damage within the section. If "compensation for damage" does not include damage for loss of reputation or consequent business loss—such not being actionable damage—I am of opinion that "full" does not enlarge the meaning so as to comprehend such remote injury.

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(1) 32 L. Ir. 675.

(4) [1891] 3 Ch. 115.

(2) 50 W. R. 323. [1904] 1 K. B.
725.

(5) [1900] 2 Q. B. 423.

(6) [1892] 1 Q. B. 458.

(3) [1899] 2 Q. B. 286.

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The last point on the construction of the section was the effect of the expression "fact of damage." On this two cases were cited—the *Brierley Hill Case* (1), and *Walshaw v. Brighthouse Corporation* (2). The former case related to injury to access to the plaintiff, Pearsall's, house from an alteration of the roadway, under the Public Health Act, 1875. The case is best understood by reading the judgments of Bowen, L.J., at the trial and of the Court of Appeal (3). In an action on an award, the defendants disputed liability and the plaintiff's title. Bowen, L.J., ruled that an arbitration, before liability was determined, was premature, and dismissed the action. He was of opinion (p. 741) that there was no intention in the section that questions of liability should in any event be submitted to an arbitrator. On this last point the Court of Appeal agreed, but they over-ruled him on the ground that the arbitration was governed by the settled principle and practice under the Lands Clauses Consolidation Act, that the arbitration might precede the question of liability. The function of the arbitrator and jury is only to deal with *quantum*. They assume that the applicant is entitled to succeed, and settle only the amount of compensation. Persons claiming compensation may have several questions to be determined, but only two are referred to arbitration; the rest are to be decided by ordinary tribunals: Lindley, L.J., and Fry, L.J. (4). The law is stated to the same effect by Blackburn, J., in the *Buccleuch Case* (5). In *In re East London Railway Co., Oliver's Claim* (6) (after the decision of the House of Lords in the *Brierley Hill Case* (1), which was cited to the Court), Fry, L.J., repeats (p. 516) that the two questions of *quantum* of compensation and of liability were tried separately, the first before Justices or by arbitration, the other by action on the award or judgment. He did not understand that in the *Brierley Hill Case* (1) the House of Lords intended to alter or revolutionize the existing settled construction of the Lands Clauses Act, which they professed to be applying to the Public Health Act, as appears from Lord Watson's speech.

(1) 9 A. C. 595.

(2) [1899] 2 Q. B. 286.

(3) 11 Q. B. D. 735.

(4) 11 Q. B. D., pp. 748, 749.

(5) L. R. 5 Ex., at p. 227.

(6) 24 Q. B. D. 507.

The marginal note correctly represents the actual point decided. I think that the speeches mean no more than that the arbitrator, for his own guidance, has to consider certain facts, but that his *prima facie* decision could not bind as to liability. The distinction is clearly pointed out by Fletcher Moulton, L.J., in *North Western Rubber Co., Limited* (1), where, referring to Fry, L.J.'s judgment in *Hutcheson v. Eaton* (2), he says, "They" (the arbitrators) "are the appointed parties to decide them" (the facts) "only in the sense that they must do so in order to guide them in their work, and they are not the appointed parties to decide them conclusively, so that their decision shall decide the rights of the parties." The position of a Justice is often the same, as I pointed out in *Lord De Vesci's Case* (3). Now, section 274 is a general section, and, no matter what subject-matter it is applied to, the function of arbitrators is the same. Can they determine finally and conclusively, under "fact of damage," that the person claiming compensation is not himself in default, the very point on which liability in this case must depend? If they could not so determine in a case relating to compensation for injuriously affecting land, &c., under the Act of 1878, the same result should ensue in the case of a condemned pig. They should value on the assumption that the pig was sound when seized. In *Walshaw's Case* (4) the Court held that a finding by the arbitrator as to the soundness was conclusive, on the ground that he could not do his duty without investigating whether the meat was sound or not; and that he was entitled to, and should, find as a fact that the plaintiff was not in default. The phrase "fact of damage" seems hardly to apply to cases like the present; it was probably used *alio intuitu*. If a sound pig is wrongfully condemned, no question as to "fact of damage" could arise. Without those words, the arbitrator, if entitled to decide that the pig was sound, need only consider the question of amount of compensation. If "fact of damage" authorizes an adjudication that the owner is guilty of no default, thus determining liability, the phraseology, having regard to the Lands Clauses Act, is not happy. How can

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(1) [1908] 2 K. B. 907, at p. 921.

(2) 13 Q. B. D. 861.

(3) [1908] 2 Ir. R., at p. 303.

(4) [1899] 2 Q. B. 286.

K. B. Dir. the question of default be decided without deciding as to ownership?—a question which, as the Lands Clauses cases all show, never could be disposed of by jury or arbitrators. I will not now express any final opinion on this difficult question, whether the arbitrators can adjudicate finally on the claimant being or not being himself in default, or whether they should proceed on the hypothesis that the carcass was sound, the default of the owner being a condition to jurisdiction, a wrong conclusion on which cannot give jurisdiction or enlarge jurisdiction. I shall follow the *Walshaw Case* (1). What I have said, however, shows how important it is that the fact on which default depends should be expressly found, as Smith, L.J., held it ought to be.

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Having construed the section, I now take up the award, which, though statutory and not contractual, must be construed in a liberal and reasonable way without undue strictness. Mr. Ronan contends that, if good on its face, then in the absence of misconduct on the part of the arbitrators (of which he said there was no evidence) it could not be impeached, the arbitrators being supreme judges of both fact and law. In part of his argument he appeared to go so far as that they had authority to construe the section, and to interpret "full compensation" as including consequential trade loss. However wide their power, they could not enlarge their jurisdiction by misconstruing the section: *Goff's Case* (2); *De Vesci's Case* (3). The same rule is always applied in private submissions. If the sum awarded includes a sum not legally "damage," it is, *pro tanto*, *ultra vires*; and the fact can, it is obvious, and as many cases show, be proved by extrinsic evidence, whether on motion to this Court, or in defence to an action on the award. An award good on its face cannot be upset for mistake of law on the part of the arbitrators, acting within their jurisdiction (save in certain exceptional cases), but the moment jurisdiction is exceeded, they cannot, by concealing the excess under an apparently correct form of language, evade the jurisdiction of the Court, if that excess is proved: *De Vesci's Case* (4).

(1) [1899] 2 Q. B. 286.

(2) [1905] 2 I. R. 121.

(3) [1908] 2 I. R. 285, at p. 303.

(4) *Ibid.*, p. 305.

The elaborate judgment of Blackburn, J., in the *Buccleuch Case* (1) states the law fully on the subject.

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Smith's counsel urge further that no part of the £32 is shown to be made up of business loss, even assuming that such loss could not be legally allowed, and that no vice in that respect is established against the award. They say that there is no proof that the arbitrators, in admitting evidence as to publicity of the proceedings before the Justices, ever acted on such evidence. Obviously there could be no direct evidence without the arbitrators' testimony.

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Looking at the case as a whole, the reception of this misleading evidence in the face of objection, the argument of counsel before them, Smith's claim, and the absence of any evidence on his part that any other items were presented to the arbitrators, I have come to the conclusion that portion of the sum awarded represents business loss. The facts of *Brophy v. Holmes* (2) were different; but the way that Blackburn, J., deals with the case in the *Buccleuch Case* (3) is instructive. Unfortunately I have not the advantage of knowing the arbitrators' version, and in the absence of their testimony I must act on inference.

According to Lord Chelmsford in the *Buccleuch Case* (4):—

"The defendants had an undoubted right to know from him (the arbitrator) whether, in his estimate of the compensation, he took into consideration any matters not included in the reference, and therefore not within his jurisdiction."

If examined at the trial—Lord Cairns says, p. 462:—

The arbitrator could be asked what was the course of the argument before him—"what claims were made and what admitted."

If such evidence could be compelled and given at a trial, it is to be regretted that no such evidence has been offered here. I do not know if the arbitrators have been asked to make affidavits. Possibly without an intimation from the Court they might feel unwilling to do so. It is significant that Smith himself has made no affidavit, and does not state the figures he presented

(1) L. R. 5 Ex., pp. 225-245.

(3) L. R. 5 Ex., at pp. 232, 233, 234.

(2) 2 Molloy 1.

(4) L. R. 5 H. L., at p. 457.

K. B. Div. 1909. for consideration. I think I should assume that his written claim represents what he honestly thought he could claim.

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Whether the award is bad because it does not state, as matter of fact, that the carcase, when seized, was sound, is a still more difficult point. Mr. Ronan contends that, if a finding as to Smith not being in default was incompetent, the award is free from objection, as it deals with the fact of damage, and the reference to Smith not being in default cannot prejudice in any ulterior proceeding, being *ex hypothesi* without jurisdiction. On the other hand, if it is a necessary averment, he argues that it necessarily imports that the carcase was sound. Mr. Matheson replies that the averment is a matter of law, and that the arbitrators—though required to state the fact specifically—evaded the obligation to do so, and adopted the circuitous phraseology of the section, with the probable notion that, even though the carcase was unsound, Smith himself was not to blame. They were not lawyers, and may not have been aware that *mens rea* did not enter into the case. The word “himself” to the ordinary mind might suggest that Smith, purchasing at a sound price, and having no knowledge of the condition of the carcase, was not personally in default, and could therefore claim compensation. It is much to be regretted that the arbitrators did not state, as they ought to have done when requested, the fact one way or the other; that is, if they were agreed. Possibly they may not have agreed as to the soundness or unsoundness, and interpreting the section erroneously in the sense Mr. Matheson suggests, they may have thought that Smith, being free from moral blame, should be compensated. The Court, however, cannot go upon surmise. If the section does not authorize an adjudication as to soundness, I should think that the award would be vitiated by an attempted adjudication, as it would be without jurisdiction; and it would be no answer that it was “*inutile*” and could do no harm—that being the result in every case of exceeded jurisdiction. On the other hand, if there *was* jurisdiction to find the fact, the only question would be, do the words of the award sufficiently express this meaning? If the award had found expressly that the carcase was sound, the addition that “the owner was not himself in default” would have been a mere conclusion of law from that fact

I am not satisfied that the negating of default in the award could work an estoppel. Suppose, for instance, the action went on, and the arbitrators admitted that they had found in fact that the carcase was unsound, but that the owner was not himself to blame, could the plaintiff successfully urge that the form of words adopted must be construed as an express finding of fact the other way, which, if within the arbitrators' jurisdiction, would, according to *Walshaw's Case* (1), be a final decision, incapable of being reviewed? I am inclined to think that the award in this respect falls within the observations of Turner, L.J., in *Wakefield's Case* (2).

Mr. Ronan lastly contends that, there being an action pending, and it being competent for the defendants to utilize all the objections now raised by way of defence,—as to this I agree with him—the Court in its discretion should refuse the motion. But the shocking and exorbitant cost of the arbitration, estimated nearly at £300, makes me unwilling to add to that wasteful expenditure by any order of mine; and I have anxiously thought upon the form of relief which will dispose of the controversy with the least cost to the luckless litigants. The whole case is a great scandal and opprobrium to our jurisprudence. A public body, acting in good faith, gets a pig's carcase condemned by a judicial authority; the damage and compensation are left to arbitration of lay authority, who can (it is alleged) reverse the judicial authority; and the validity of their action is to be tested by a High Court action. The Legislature never could have contemplated such a state of things, which would deter any sanitary authority from attempting to exercise its powers. Parliament obviously thought arbitration a cheap mode of settling disputes as to compensation, and little anticipated that a pig should be subject to arbitration conducted on the Lands Clauses Acts principles.

In the present case, the rights of the parties, whether the action proceeds or not, will be finally and completely disposed of if, and when, the arbitrators state—(1) whether they found the pig was sound or not; (2) to what extent consequential business loss enters into the sum awarded.

(1) [1899] 2 Q. B. 286.

(2) 3 De G. J. & Sm. at p. 16.

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What is the best course for the Court to adopt in the interests of, and in mercy to, the parties? If I set aside the award, and let the case go again to the arbitrators, with new fees and law costs, the last state of the defendants will be worse than the first. If I make no rule on the motion, so as to allow the action to go on, costs would be largely increased, while little or no advantage would be gained, the only matters of fact in dispute being the two points above noticed, which the arbitrators alone can answer satisfactorily. If the arbitrators at the trial answer that portion of the £32 was for matter beyond their jurisdiction, to that extent the award would be *ultra vires*, but the rest would stand. As to the other point, if it appeared that the carcass had been found to be sound, the plaintiff might, if the Court held the award to be uncertain, lose his remedy. The only advantage of allowing the action to pursue its course would be to enable an appeal to be taken to the House of Lords—a course, in a case like the present, outside practical consideration.

I think the speediest, cheapest, and most efficacious remedy to apply is, under section 11 of C. L. P. Act, 1856, reproduced in our Rules (1), to remit the award to the arbitrators to correct. The power of the Court is wide, and is exercisable, notwithstanding even a prohibitory clause in a submission. The nature of the summary jurisdiction of the Court is explained by Blackburn, J., in the *Buccleuch Case* (2); it can be applied to correct errors in part or the whole of an award: *Morris' Arbitration* (3); *Bird v. Penrice* (4); *Coleman v. Cork & Youghal Ry. Co.* (5); *Re Aitken* (6). The present case comes within the statute: *Knowles v. Bolton Corporation* (7); and recent decisions show that this salutary jurisdiction is applied with greater liberality than formerly. Under the English Arbitration Act it has even been applied in case of newly discovered evidence: *Re Keighley* (8). Attempts have been made by judicial definition to restrict the jurisdiction to certain categories of cases; but, as observed by text-writers, such definitions fail to account for several recognized decisions, and I am

(1) Order LVI., Rule 5.

(2) L. R. 5 Ex. 221.

(3) 6 L. & B. 383.

(4) 6 M. & W. 754.

(5) 13 Ir. C. L. R. 368.

(6) 3 Jur. (N. S.) 1296.

(7) [1900] 2 Q. B. 253.

(8) [1893] 1 Q. B. 405.

unwilling to fetter the discretion of the Court, particularly since the Judicature Act, with an unnecessary strait-waistcoat. The present case, relating in part to an *ultra vires* allowance, is peculiarly within this type of relief. The arbitrators could and should be examined at the trial, and the Court should bring the award, if insufficient in form, and in part without jurisdiction, into conformity with what the arbitrators, acting within their jurisdiction, really found. In L. R. 5 H. L., at p. 436, Cleasby, B., says that, in exercising its summary jurisdiction the Court "would probably reject no means of informing itself." In *Brophy v. Holmes* (1)—a case discussed with approval by Blackburn, J., in L. R. 5 Ex., at p. 232—the Chancellor observes (p. 12):—"If the case had originally come before me, the course I should have taken would be to direct a short enquiry to examine the arbitrators upon the single point," that is, whether they excluded the guarantee there mentioned as outside the scope of their arbitration.

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I shall therefore remit back the award to the arbitrators to amend by stating—(1) how much of the £32 was found to be in respect of Smith's loss or damage by reason of the publicity of the condemnation; and (2) whether the carcase was found by them to be sound at the time of seizure. The former point is in favour of defendants, but it is not intended to preclude a negative answer. The latter is in favour of plaintiff; as, if the answer is that the pig was sound, it removes any objection on this head to the award on the ground of uncertainty. So far as regards the *ultra vires* question, it cannot prejudice the plaintiff, as the same answer given at the trial would be decisive. According to Blackburn, J., in the *Buccleuch Case* (2), the onus of proving that the award was within the limits of jurisdiction lies on the plaintiff, the arbitrators being an inferior Court; and in *Rhodes v. Airedale Drainage Commissioners* (3), on a defence that the sum awarded was in respect of matters not the subject of compensation, the Court threw out that the award itself is not evidence that the compensation was in respect of matters the subject of compensation.

(1) 2 Molloy 1. (2) L. R. 5 Ex. at p. 231. (3) 1 C. P. D. 380.

K. B. Div. I would gather that Blackburn, J.'s, opinion in the *Buccleuch*
 1909. *Case* (1) was to the same effect. When the award is amended in
In re the above particulars, the parties will know their exact position,
 SMITH AND and the Court will be able, if its decision should be required,
 BELFAST and the Court will be able, if its decision should be required,
 CORPORATION securely and finally to determine the rights of the parties. This
 Gibson, J. ill-starred pig has had its obsequies celebrated with such lavish
 forensic pomp, that I venture to express the hope that the parties
 will, in their own interest, see the wisdom of crying halt when the
 award is corrected.

The curial part of the order was as follows :—

“The Court being of opinion that the sum of £32, awarded by the said award, represented in part a sum for injury to reputation and business loss by reason of the publicity of the proceedings taken for the condemnation of the carcase in the said award mentioned, and also being of opinion that the said award was uncertain and ambiguous in not stating whether the said carcase was or was not sound at the time of the seizure; and the Court being of opinion that the arbitrators when so required by counsel for the said Corporation ought to have set out the said matter on the face of the said award;

“And the Court deeming it expedient not to set aside the award, but to remit it back to be amended in the particulars aforesaid, the Court doth hereby remit the said award to the arbitrators, Dr. McCaw and Robert N. Boyd, to correct and amend the same within one calendar month from 14th December, 1909, by stating (1) how much of the sum of £32 awarded represents damage in respect of injury to reputation and business loss by reason of the publicity of proceedings taken for the condemnation of the said carcase; and also (2) by stating whether they found the said carcase to have been sound or unsound at the date of seizure.”

The Court ordered William Smith to pay the costs of the motion.

. On the 4th January, 1910, William Smith served a notice of appeal from this order.

On the 10th January, an affidavit sworn by John M'Caw, one of the arbitrators, was filed. The deponent stated that in obedience to the order of the King's Bench Division, the arbitrators had met on the 8th January, but were unable to agree as to the amendments directed by the said order. The deponent, as his own answers to the questions put in the order, stated—(1) "that the sum of £25 was awarded as damages for injury to reputation and business loss by reason of the publicity of proceedings taken for the condemnation of the carcase mentioned in the award; (2) the said carcase was unsound and unfit for the food of man."

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On the 13th January, Robert N. Boyd, the other arbitrator, in reply to the questions in the said order, stated that he had awarded £24 for trade loss suffered by William Smith; and that he found that the said carcase was sound, interpreting that word as meaning wholesome, and fit for the food of man.

The appeal was subsequently struck out, on the statement of counsel that the case had been settled (1).

Solicitor for the Belfast Corporation : *John M'Cormick.*

Solicitor for William Smith : *Thomas Barkley.*

J. C. W.

(1) Some of the questions involved in this case came before Channell, J., on March 21, 1910, in *Hobbs v. Winchester Corporation* (26 T. L. R. 378), and appear to have been differently decided. [REP.]

KEAN, APPELLANT ; ROBINSON, RESPONDENT (1).

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Jan. 18, 19,
Feb. 8.

Appeal.

April 20.

Justices—Summary jurisdiction—Case stated—Summons heard by several Justices—Death of some of Justices before signing case—Case signed by surviving Justice alone—Jurisdiction of Court to hear—20 & 21 Vict. c. 43, s. 2—Caretaker—Summons for delivery of possession—Writ of possession issued, but physical possession not taken—Caretaker's agreement signed—Estoppel—Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 86—Jurisdiction—Appeal—(20 & 21 Vict. c. 43), s. 6.

A summons was heard at Petty Sessions before three Justices, A., B., and C., who unanimously dismissed it, but unanimously agreed to state a case under 20 & 21 Vict. c. 43. A case, the draft of which had been approved of on behalf of both the parties, was approved of and signed by A. It was approved of by B., who, however, died without having signed it. C. died without having either approved of or signed it.

Held (by Lord O'Brien, L.C.J., and Madden, J.; Wright, J., *diss.*), that there was jurisdiction to hear the case.

R. held certain premises under a lease for three lives, subject to a mortgage to K. In the year 1902, K. recovered judgment for possession, and a writ of possession was issued. Actual physical possession was not taken under the writ, but R. signed a caretaker's agreement acknowledging that he was in possession solely as caretaker for K. R. continued to pay the rent and outgoings, but paid nothing either for principal or interest on foot of the mortgage. K. died, and the appellant, his personal representative, demanded possession from R., and on possession being refused, applied to the Justices at Petty Sessions, upon a summons issued against R., for an order for delivery of possession of the premises.

Held, by Lord O'Brien, L.C.J., and Madden, J., that the appellant was entitled to such order.

The respondent having appealed from this Order to the Court of Appeal:

Held, following *Harvey v. Copeland* (32 L. R. Ir. 419), that no appeal lay, and the Court of Appeal ordered the case to be struck out, but without costs.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions District of Balbriggan, County Dublin, on the 25th May, 1909, there were

(1) In the King's Bench Division before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

three Justices present, viz., Mr. Anthony S. Hussey, Mr. Edward H. Woods, and Mr. John Markey. A complaint was heard by them on foot of a summons issued by the appellant, as complainant, against the respondent, as defendant, requiring the defendant to show cause why he should not be ordered to deliver up possession of the licensed house and premises in Great Strand Street, Skerries, County Dublin, held by him as caretaker to the complainant. After hearing the evidence the three Justices unanimously decided to dismiss the summons, but on the application of the solicitor for the complainant, they unanimously decided to state a case for the opinion of the King's Bench Division. The circumstances attending the stating of this case are thus set out in an affidavit which was made by the Clerk of Petty Sessions:—"5. Subsequently, on the 17th July, 1909, the solicitor for the said F. John Kean forwarded to me a draft of the case stated, which had been approved of by the solicitor for the defendant, for the perusal and approval of the magistrates; and on the 20th July, 1909, Messrs. Woods and Hussey met at the Courthouse, Balbriggan, and discussed the draft of the case stated, and approved of same, and directed me to return same to complainant's solicitor for the purpose of having same engrossed and returned to them for their signature. 6. I was present when Messrs. Woods and Hussey were discussing the draft of the case stated, and I know that Mr. Woods fully approved of the case as stated. 7. Mr. John Markey, the other magistrate, called on me several times in reference to the case, and I believe that but for the fact of his death he would have signed the case as stated. He concurred with the other magistrates in agreeing to state a case, and at each interview I had with him he appeared willing to sign the case stated. 8. The said John Markey did not attend the Petty Sessions at Balbriggan since the 25th May last. 9. I know and believe that Mr. Edward H. Woods fully approved of the contents of the case stated, and that he would have signed same but for the fact of his death. 10. The case stated was returned to me engrossed by the solicitor for the complainant on the 3rd September, 1909, and I communicated with the magistrates in reference to same, asking them to attend at the Courthouse, Balbriggan, for the purpose of signing same,

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K. B. Div. but there was considerable delay in their doing so, owing to the
1910. illness of Messrs. Woods and Markey, and also to the death

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abroad of a sister of Mr. Hussey, with the result that when Mr. Hussey had signed the case, it was too late to get it signed by either Mr. Woods or Mr. Markey, Mr. Woods having died on the 4th October, 1909, and Mr. Markey having died on the 4th November, 1909. 11. The case as stated actually represents what occurred at the hearing of the summons on the 25th May, 1909, as I am aware of the facts, having been present at the hearing of the complaint on that day; and I believe that each of the magistrates who have died would have signed the case as stated, but for the fact of their death, and would concur in the statement of the facts as set out in the case stated. 12. The case as subsequently engrossed and signed by Mr. Hussey is a correct and accurate copy of the draft submitted for the approval of the magistrates, and approved of by them."

The case referred to set out as follows:—

"The summons in this case was brought under sect. 86 of 23 & 24 Vict. c. 154. . . The facts proved on the hearing or admitted by both sides were as follows:—

"Formerly Eliza Robinson, who held the licensed premises before mentioned, from Lord Holmpatrick, under lease bearing date the 31st January, 1842, for a term of forty-eight years or three lives at a yearly rent, executed a mortgage of the said premises for the sum of £100 with interest at the rate of £6 per cent. per annum to one John Morris Kean . . . The deed bore date the 13th September, 1890. The lessee's interest in the said lease of the 31st January, 1842, subsequently became vested in George Robinson, the defendant in the present case, and no payment having been made on foot of the said mortgage either for interest or principal, the said John Morris Kean on the 13th November, 1902, recovered judgment for possession of the said premises against the defendant in an action in the King's Bench Division . . . The writ of summons was produced, and the original writ of possession was produced . . . and bears a note of having been received in the Sheriff's Office on the 21st November, 1902, at 2.30 o'clock, p.m., and also bears an endorsement signed by the Sheriff . . . as follows:—'County of Dublin to wit, I authorize

and empower John Doody and Robert Grundy, my bailiffs, or either of their assistants, to execute the within writ of possession. Given under my hand and seal this 22nd day of November, 1902, A. Jameson, Sheriff.' It does not appear from any endorsement that the said writ of possession was duly executed, and beyond producing the said writ the complainant offered no evidence that it had been duly executed. The complainant, who is the administrator of the said John Morris Kean, now deceased, admitted that he had not paid the rent issuing out of the premises, or the licence duty or the taxes, nor did he know by whom the said rent, licence duty, and taxes had been paid since the execution of the mortgage. He could not say what sum was now due on foot of the mortgage, but as far as he knew no interest had ever been paid on foot thereof.

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"The defendant admitted on examination that a man attended from the Sheriff's office to take up possession of the premises, and a caretaker's agreement was handed in and duly proved and marked by us, signed George Robinson . . . The caretaker's agreement is set out in the appendix hereto. The defendant admitted that as far as he knew no money had ever been paid either by him or anyone else before him on foot of the said mortgage. He always paid the rent, taxes, and licence duty, and some years ago entered into an agreement with his landlord for a new lease. The defendant in his evidence admitted his signature to the document, and that he had signed the document on the occasion of the Sheriff's man going there. On cross-examination no question was put to him to suggest that he had ever been physically put out of possession.

"John M. Kean, died on the 5th May, 1908, intestate, and letters of administration of his personal estate were granted on the 15th October, 1908, to John F. Kean, the complainant in the summons"

The case then set out a demand of possession from the defendant by John F. Kean, and a refusal by the defendant to give up possession. It set out the contentions raised on behalf of the defendant, viz., first, that John F. Kean should prove his title to the premises, and prove that he was owner within the meaning of section 86 of 23 & 24 Vict. c. 154; and secondly that complainant must prove, and had offered no evidence to prove, that George

K. B. Div. Robinson had been actually and physically put out of possession of the premises; and the case continued:—

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Respondent. “We held upon the evidence that John F. Kean was administrator of John M. Kean (the mortgagee of the leasehold interest in the said premises), and, if such be sufficient evidence of ownership, that he was owner within the meaning of the said section.

“We held as a matter of law that, although the defendant had signed the caretaker’s agreement which was produced and proved before us, he was not put into possession of the premises as a caretaker within the meaning of section 86 of 23 & 24 Vict. c. 154; and we held that the fact that the defendant, George Robinson, had signed the caretaker’s agreement did not prevent him from requiring the complainant to prove his title to the premises as owner, and we accordingly dismissed the case on the merits.”

The judgment of the Court was required as to whether the Justices were correct in point of law in their determination, or as to what should be done in the premises. The case was signed by Mr. Anthony S. Hussey.

The caretaker’s agreement, above referred to, was in the following terms:—

“I, George Robinson, of Skerries in the county of Dublin, do hereby acknowledge that I have been this day put into possession of ALL THAT dwelling-house and premises (licensed), situate in Great Strand Street, Skerries, in the parish of Skerries, in the barony of Balrothery, and county of Dublin, as caretaker, by and for John M. Kean, of Dame Street, Dublin, esquire, and that I am now in possession of said premises solely as such caretaker of and for the said John M. Kean, and not under any contract of tenancy; the possession of which said premises the said John M. Kean has lately recovered under a judgment of the High Court of Justice in Ireland, King’s Bench Division; and I hereby further acknowledge that I have undertaken and agree with the said John M. Kean, to take care of the said premises for him and to preserve same from trespass and injury, and to deliver up the possession thereof to the said John M. Kean, his heirs, or assigns, when required so to do. Dated this 17th day of January, 1903.

George Robinson. Witness having first truly read and explained the foregoing to the said George Robinson. William T. Collins, 25, Westmoreland Street, Dublin, John Doody, for Sheriff." K. B. Div.
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D. J. O'Brien, for the appellant:—

There is jurisdiction to hear the case. The affidavit of the Clerk of Petty Sessions shows that all the magistrates were prepared to state a case in the form now before the Court, and the only thing lacking is the signature of the two magistrates who died. Such want of signature being a defect caused by the act of God, the maxim applies: "*Actus Dei nemini injuriam facit.*" When a duty is cast upon a person by law and not by his own voluntary contract, impossibility caused by the act of God excuses: *The Queen v. Justices of Leicestershire* (1). This principle distinguishes the present case from cases like *Westmore v. Paine* (2), *Barker v. Hodgson* (3), and *Toppin v. Marcus* (4). [He also referred to *Morgan v. Edwards* (5); *The King v. Justices of Antrim* (6).]

Horan, for the respondent:—

The authorities show that the conditions imposed by section 2 of 20 & 21 Vict. c. 43, are conditions precedent to the jurisdiction of the Court to hear the case, and must be strictly complied with: *Guardians of South Dublin Union v. Jones* (7). In *Nettleton v. Burrell* (8), the Court, while not deciding whether or not signature was absolutely necessary, held that approval was clearly necessary. In the present case the evidence shows that one of the Justices, Mr. Markey, never approved of the case.

D. J. O'Brien, in reply:—

Even though the Court should come to the conclusion that Mr. Markey did not approve of the case, the absence of such approval, like the absence of signature, was the result of the act of God, and the same principle applies.

(1) 15 Q. B. 88.

(2) [1891] 1 Q. B. 482.

(3) 68 J. P. 310.

(4) 42 I. L. T. R. 87.

(5) 5 H. & N. 415.

(6) [1906] 2 I. R. 298.

(7) 12 L. R. Ir. 358.

(8) 7 M. & G. 35; 8 Scott N. R. 738.

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LORD O'BRIEN, L.C.J. :—

We shall hear the case, reserving our judgment on the preliminary point.

D. J. O'Brien :—

The decision of the Justices was wrong. The respondent was estopped by the agreement of the 17th January, 1903, from denying that he held the lands as caretaker for John M. Kean; and all the estate of John M. Kean in the lease vested on his death in the appellant: Conveyancing and Law of Property Act, 1881, s. 30.

Horan :—

I contend, first, that a mortgagee is not an "owner" within section 86 of 23 & 24 Vict. c. 154. The owner contemplated by that section is a person in the nature of a landlord.

Secondly: The respondent is not a caretaker. He was never legally put out of possession. The agreement of 1903 is not conclusive; the conduct of the parties must be taken into account, and the fact that the rent and outgoings continued to be paid by the respondent negatives the idea of his being caretaker.

Cur. adv. vult.

Feb. 8.

WRIGHT, J. :—

The question in this case arises upon a case stated by Justices under 20 & 21 Vict. c. 43. A summons had been issued by the appellant, as complainant, under section 86 of 23 & 24 Vict. c. 154, to recover possession from the respondent of certain premises held by him as caretaker to the appellant. The summons was heard before three Justices, Mr. Anthony S. Hussey, Mr. Edward H. Woods, and Mr. John Markey. They unanimously decided to dismiss the summons without prejudice, and, on the application of the complainant, unanimously decided to state a case. This was on the 25th May, 1909. A peculiar state of things then occurred. The facts are succinctly stated in the affidavit of the Clerk of Petty Sessions, made, I believe, in accordance with a suggestion of this Court, from which I proceed to read :—"Subsequently, on the 17th July, 1909, the solicitor for the said John F. Kean forwarded

to me a draft of the case stated, which had been approved of by the solicitor for the defendant, for the perusal and approval of the magistrates, and on the 20th July, 1909, Messrs. Woods and Hussey met at the Courthouse, Balbriggan, and discussed the draft of the case stated, and approved of same, and directed me to return same to complainant's solicitor for the purpose of having same engrossed and returned to them for their signature. I was present when Messrs. Woods and Hussey were discussing the draft of the case stated, and I know that Mr. Woods fully approved of the case as stated." It appears from the affidavit that the case was signed by one of these two magistrates, Mr. Hussey, but was never signed by the other, Mr. Woods, who died on the 4th October, 1909. It was never signed by Mr. Markey, the third magistrate, who died on the 4th November, 1909; but the Clerk of Petty Sessions states in his affidavit that he believes that but for the fact of his death he would have signed it, and that at each interview he had with him he appeared willing to sign it. I believe, however, that on the facts as stated in the affidavit all the members of the Court are agreed that Mr. Markey never approved of or stated a case. Accordingly, the document before us now is a document to which two out of three magistrates assented, and which is signed by one only. The third magistrate neither signed it nor approved of it. The question is, have we, on these facts, jurisdiction to hear the case.

The jurisdiction arises under the Act of 20 & 21 Vict. c. 43, an Act not confined to Ireland, but applying to England also. It is remarkable that although more than fifty years have elapsed since the passing of the Act, the point we have now to decide has never arisen. A fatality of this kind does not appear to be provided for by the Act. Section 2 is as follows:—"After the hearing and determination by a Justice or Justices of the Peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force, or hereafter to be made, either party to the proceeding before the said Justice or Justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said Justice or Justices, to state and sign a case setting forth the facts and grounds of such determination, for the

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K. B. Div. opinion thereon of one of the Superior Courts of Law, to be named
 1910. by the party applying; and such party, hereinafter called 'the
 KEAN, appellant,' shall, within three days after receiving such case,
Appellant; transmit the same to the Court named in his application, first
 ROBINSON, giving notice in writing of such appeal, with a copy of the case so
Respondent. stated and signed, to the other party to the proceeding in which
 Wright, J. the determination was given, hereinafter called 'the respondent.'"
 It is to be observed that the application to state a case is to be made
 to "the said Justice or Justices." As we are aware, in some cases a
 single Justice can adjudicate; and I think that these words are to
 be read *reddendo singula singulis*, and that what the section con-
 templates is that the case is to be stated and signed by the Justice,
 if only one, or Justices, if more than one, who heard and determined
 the case.

We have been referred to a number of authorities, but none of
 them throw much light on the question, which in the end turns on
 the construction of the section.

In *Toppin v. Marcus* (1) a summons had been heard by four
 magistrates, who had dismissed it. Three of these stated a case;
 the fourth did not. Counsel for the prosecutor applied for a
 conditional order for a writ of mandamus directed to the fourth
 magistrate to compel him to state and sign a case. It was con-
 tended on behalf of the prosecutor, and, in my opinion, rightly
 contended, having regard to the language of the Act, that a case
 stated should be stated and signed by all the Justices who had
 heard and determined it.

In the English case of *Westmore v. Paine* (2) the decision is so
 clear on the facts that it does not help much. There the applicant
 was convicted by a Court of Summary Jurisdiction, consisting of five
 Justices. He made an application in writing for a case to two
 only of such Justices, both of whom stated and signed the case.
 The Court held that the appellant had not complied with the
 directions requiring an application in writing to each member of
 the Court, and that there was no jurisdiction to hear the case. In
 the concluding paragraph of his judgment, Pollock, B., says:—
 "The case could not be properly said to be before the Court. It

(1) 42 I. L. T. R. 87.

(2) [1891] 1 Q. B. 482.

is clear from the decisions in *South Staffordshire Waterworks Co. v. K. B. Div.*
Stone (1), and *Lockhart v. Mayor, &c., of St. Albans* (2), that the 1910.
 statutory requirements as to proceedings by case stated are conditions precedent of the right of appeal, and cannot be waived by the parties or Justices."

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Another case referred to was *The Queen v. Justices of Leicestershire* (3). The application there was under 8 & 9 Vict. c. 10, sect. 3. I read the marginal note:—"After an order in bastardy had been made, the putative father, intending to appeal, entered into a recognizance according to statute 8 & 9 Vict. c. 10, sect. 3, and on the same day sent notice of his having done so by post to the woman. When the appeal came on to be tried, it was proved that the woman had died before the notice to her was posted; and the Sessions being of opinion that the condition imposed by statute 8 & 9 Vict. c. 10, sect. 3, as preliminary to the appeal had not been complied with, refused to hear the appeal. *Held*, on demurrer to the return to a mandamus to enter continuances and hear the appeal, that performance of the condition imposed by law having by the act of God become impossible, its performance was excused, and a peremptory mandamus was awarded." Here we come for the first time to a case where the doctrine is discussed as to whether when the performance of a condition has been rendered impossible by the act of God, the condition is dispensed with. The doctrine there was applied to the case of a condition to be performed by one of the parties. A duty was cast on a party to do something—to serve a notice—and this having been rendered impossible by the death of the party to be served, he was held excused.

I come now to a case where the question of want of signature arose. *Nettleton v. Burrell* (4) was decided upon a section somewhat analogous to the present. The marginal note is as follows:—"Where a revising barrister, having assented to the substance of a special case agreed upon by the parties thereto, died without having finally settled the terms in which the statement should be made, the Court refused to allow the case to be entered. Whether,

(1) 19 Q. B. D. 168.

(2) 21 Q. B. D. 188.

(3) 15 Q. B. 88.

(4) 7 M. & G. 35.

K. B. Div. 1910. supposing the assent of the revising barrister to have been given to the special case in its terms, the Court would allow the case to

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be entered without his signature after his death, *quære*." That case was, as I have said, decided upon a section somewhat analogous in its terms to the present, viz., section 42 of 6 & 7 Vict. c. 81. It provides that the revising barrister is to state in writing the facts of the case, and his decision, and is to read this statement to the appellant in open Court, and then and there to sign it. It did not appear in *Nettleton v. Burrell* (1), although the case was found among the papers of the revising barrister, that he had approved of it. Serjeant Kinglake, in arguing the case, submitted that the provisions of the section were merely directory; that absence of the signature of the revising barrister was immaterial, as the facts disclosed by the affidavit sufficiently showed that he had substantially approved the statement of facts, and that the alterations which he required were merely formal. Tindal, C.J., in giving judgment, says:—"The presumption appears to be that he did not quite approve of the statement; or at least that he entertained some doubt concerning it. Possibly he may have intended to make some alteration before signing it; otherwise he would in all probability have signed it at once. As the statement was not finally settled by the barrister, the whole matter appears to have been still *in fieri*. The case therefore is not within our jurisdiction." So that the question whether signature was essential or not was left unsolved.

I cannot find any case deciding the question we have to decide here; and it comes, as I have said, to the construction of the section, section 2 of 20 & 21 Vict. c. 43. The privilege given to the suitor is given by that section, and that section alone. The machinery is entirely statutory; and if the statutory requirements cannot be complied with, it is, in my opinion, impossible to supply the deficiency. I would test the matter in this way. Suppose this was an order made by one magistrate alone, in a matter in which one magistrate had jurisdiction, and assuming that such magistrate had drawn up a case, which had been submitted to and approved of by the parties, and which embodied all the facts proved before the magistrate, and his findings thereon, but he had

not signed it, would that satisfy the section? I am of opinion that it would not. In my opinion, the only thing which could give finality to the case would be signature of the magistrate who decided it.

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I am unable to come to the conclusion that where three magistrates have decided a case, we have any jurisdiction except upon a case signed by all those three magistrates. No provision is made in the Act for the death, illness, or absence of a magistrate, and I am unable to hold that signature by one is equivalent to signature by the three, or that approval by two, as in the present case, is equivalent to approval by the three.

MADDEN, J. :—

My brother Wright has gone fully into the facts of the case. What I desire to consider is the application to these facts of two legal principles as regards the authority of which there can be no doubt, although there may be difficulty in their practical application.

I start with the fact that the three magistrates who heard the summons unanimously agreed to state a case. The case was drafted, submitted to, and approved by two of these three magistrates, Messrs. Woods and Hussey. Mr. Hussey signed the case. That is a fact of vital importance, inasmuch as it distinguishes the present case from that which was suggested of a summons heard by a single magistrate, who proposed to state a case, but died without having either signed or approved a case stated. In such a state of facts there would be no case before the Court. Here there is a case signed by one of the three presiding magistrates by whom it was proposed to state it. I deal with this case on the assumption that the signature of the case by all the presiding magistrates is a condition precedent to its consideration by this Court. On that point there is no difference of opinion between my brother Wright and myself. But the question for our decision in the present case is, whether compliance with this condition having become impossible by the act of God, the performance of the condition which has thus become impossible has been excused. On this point I have the misfortune to differ from my brother Wright.

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As regards the third magistrate, Mr. Markey, the matter stands in a different position. There is evidence that he was willing to sign the case, but on the whole I concur with the other members of the Court in thinking that it does not go so far as to establish that he approved of the case. I therefore deal with the matter on the assumption that, while the case was signed and approved of by Mr. Hussey, and approved of by Mr. Woods, it was neither signed nor approved of by Mr. Markey.

As my brother Wright has pointed out, no statutory provision has been made for the contingency of the death of one of a bench of magistrates who have agreed to state a case occurring before the signature of the case; but I am of opinion that, by the application to such a state of facts of settled legal maxims, such a contingency has, by the general law of the land, been provided for.

As regards Mr. Woods, it has been established to my satisfaction that he approved of the case. This being so, the purely consequential act of signing, although a condition precedent, would, in my opinion, be dispensed with. This point was raised, but not decided, in *Nettleton v. Burrell* (1). There the Court refused to entertain an appeal from a revising barrister, under 6 & 7 Vict. c. 18, s. 42, which had not been signed by him. The case for appeal had been drawn up by the barrister, handed to the parties, and approved on their behalf. It was returned to the barrister, who died without having signed it. The Court was not able in that case, as I am unable in the case of Mr. Markey, to come to the conclusion that the magistrate had actually approved of the case; but it is intimated by Maule, J.—and the same idea underlies the observations of Tindal, C.J.—that if the evidence had gone so far as to show that the case had been approved by the barrister, the consequential and *quasi* ministerial act of signature would have been dispensed with. Although the Court would probably have so held, the question was not decided. I note the case of *Nettleton v. Burrell* (1) because it is relevant having regard to the distinction between the positions of Mr. Woods and of Mr. Markey; but to my mind both cases are covered by the

(1) 8 Scott, N. R. 738.

application of the same general principles. These are two :—First, *Lex not cogit ad impossibilia*. The impossibility in this case is of a special character, and calls into operation the application of the second principle—*Actus Dei nemini injuriam facit*. In one case, *Morgan v. Edwards* (1), it was suggested that the former maxim might be called in aid where the act of God did not intervene, the cause of the impossibility being one of another character. There it was held that the transmitting the case to the Court, and the giving notice to the respondent, are conditions precedent to the right of the appellant to have the case heard; Channell, B., who delivered the judgment of the Court, adding :—“ We guard ourselves, however, as the Court of Queen’s Bench did, to this extent, that when an appellant may have done all that he could do in order to comply with the statute, as, for instance, supposing personal service on the defendant to be necessary and made impracticable by his keeping out of the way, there might be ground for considering whether a party might not be allowed to enter his case, though the statute may not have been strictly complied with.” The case there put is not nearly so strong as the present, inasmuch as the reason which is suggested for dispensing with performance of a condition precedent rests solely on the principle, *Lex non cogit ad impossibilia*. I do not rest my decision on this maxim alone; but the case is important as showing that the English Courts have gone the length of suggesting that a condition precedent may be dispensed with where the party interested in having the case heard has done all in his power to comply with the condition, and for some cause, even though unconnected with *actus Dei*, compliance has become impossible.

I now come to the principle upon the application of which to the facts of the present case my decision rests. This principle applies equally to Mr. Markey, whom I take neither to have approved nor signed the case, and to Mr. Woods, who approved but did not sign it. In each case I hold that compliance with the condition precedent of signature having been rendered impossible by the act of God, compliance is dispensed with. An authority which affords a satisfactory basis for my judgment is *The Queen v. Justices of Leicestershire* (2). In that case the sending of notice

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(1) 5 H. & N. 415.

(2) 15 Q. B. 88.

K. B. Div. of appeal was, by the statute, a condition precedent to the right of appeal. The person upon whom the notice should have been served was dead at the time of posting the notice. It was held—I 1910.
 KEAN
Appellant : quote from the judgment of Patteson, J.—“that, as the duty of
 ROBINSON, the appellant to give such notice was cast upon him by the law,
Respondent. not by his own voluntary contract, he is excused from performing that duty by its becoming impossible by the act of God.”
 Madden, J.

The case of contract, I need hardly say, rests on a different basis, and has no application to the present case. Here the parties are given by statute an opportunity of obtaining the judgment of this Court upon the decision of a Court of inferior jurisdiction by means of a case stated. The necessity of applying for and obtaining a case complying with all statutory conditions is cast upon the party desiring to obtain the judgment of this Court, not by his own voluntary contract, but by the law.

The document before us is attested by the signature of one of the three presiding magistrates as being the case which the entire bench agreed to state. Authentication by the signatures of the other magistrates ought, in my opinion, to be dispensed with, inasmuch as the absence of compliance with this condition has been the result, not of any act or default of the party applying for the case, but of what is known as the act of God.

LORD O'BRIEN, L.C.J. :—

“*Actus Dei nemini injuriam facit*”—“*Lex non cogit ad impossibilia*,” are familiar maxims of our law. Can they under the circumstances of this case absolve from a statutory provision? This is the principal question we have to decide. To what extent these maxims of our law apply is shown by the case of *The Queen v. Justices of Leicestershire* (1). In that case it appeared that an order was made against a putative father. It was provided by statute that in case of an appeal against the order notice should be given to the woman in whose favour the order was made. In the particular case, it was proved that the woman had died after the order was made and before the posting to her of the notice of appeal. This being so, the magistrates before whom the case

came on to be heard refused to hear it, on the ground that the notice had not been served on the woman who died. An application was made to the Court of Queen's Bench in England for a mandamus to compel the magistrate to hear the case; and, after argument and consideration of the authorities cited, the application was granted. Patteson, J., delivered the judgment of the Court. He is reported to have said, "We are of opinion that as the duty to give such notice was cast upon him [the appellant] by law, and not by his own voluntary contract, he is excused from performing that duty by its becoming impossible by the act of God." This is the language of Mr. Justice Patteson, stating what is now the well-established law. It draws the familiar distinction between a duty created by law and a duty created by voluntary contract, when a party can introduce any stipulation he likes.

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Now then, what are the circumstances of the particular case before us? The defendant was charged by summons that he was put into possession of certain lands as a caretaker, and that possession was demanded from him, and that he refused to give up possession. It appeared in evidence that the defendant had been owner of the premises under, I believe, a freehold lease; that he mortgaged them to a man named Kean, who died, and whose personal representative the plaintiff in the summons is. The mortgagee, of whom the plaintiff is the personal representative, brought an action to recover possession against the mortgagor, that is to say the defendant; and, without making the defendant give up the actual possession of the premises, permitted him to remain in possession, he signing the usual caretaker's agreement. At the hearing before the magistrates it was contended that, as it was not shown that the mortgagee had put the defendant into actual possession, the plaintiff was not entitled to recover possession; that merely allowing the defendant to remain in possession, without putting him out and putting him back, was not sufficient. There is nothing whatever in this point, because the caretaker's agreement, under which it is stated that defendant was put into possession, was signed by the defendant, and he is clearly estopped from making any such point. From the making of the caretaker's agreement down to the present day, there was no alteration of circumstances. The relation which existed has not been altered

K. B. Div. by any change of circumstances. If the mortgagee was alive, the
 1910. defendant would clearly be estopped from denying that he held
 KEAN, under a caretaker's agreement, and from denying the attribute and
Appellant ; essential character of such an agreement, namely, that he was put
 ROBINSON, in as a caretaker, and that the man who put him in as such, or
Respondent. Lord O'Brien, his representative, could, on demand on him and refusal by him
 L.C.J. to give up the premises, put him out. . Now-a-days, on the death
 of a sole mortgagee, real estate as well as personalty devolves on
 the personal representative. The magistrates refused to grant an
 order for possession, and in doing so they were clearly wrong.
 They decided against the plaintiff in the summons, and thereupon
 the plaintiff asked them to state a case for the determination of
 this Court pursuant to the provisions of the Case Stated Act.
 They consented to do so ; but, before they had done so, two of the
 magistrates had died. The third magistrate, who survived both,
 stated and signed a case. One of the two magistrates had neither
 approved of nor signed the case. One had approved of it but had
 not signed. The third, as I said, approved and signed. The
 applicant, that is to say the plaintiff in the summons, was in no
 default whatever. Are we under the circumstances sufficiently
 seised of the case ? Is the case rightly before us ? Applying the
 maxims to which I referred at the outset of my judgment, I think
 it is. Applying the maxim *Actus Dei nemini injuriam facit*—the
 act of God does injury to no one—I think the case is adequately
 stated, that is to say that it was competent to the surviving magis-
 trate to state the case. If the surviving magistrate was not compe-
 tent to state a case, injury would be done to the applicant for the
 case by the act of God—the death of the two magistrates who
 died—and the maxim telling us that the act of God does not, and
 therefore should not, be ever deemed as capable of doing injury
 to anyone, would be violated. If the case could not be heard,
 then, without any default on the part of the applicant, injury
 would be done to him. Having regard to the special facts of
 this particular case (I say nothing as to a case heard before one
 magistrate only who died without signing a proposed case), and
 to the maxims of law that I have referred to, this case should be
 regarded and dealt with as if the original summons had been
 heard by one magistrate alone, that is the surviving magistrate.

A contrary view would lead to this result, namely, that if a case was stated by, say, eight magistrates out of nine, and that one, owing to death, had not signed it, the case stated could not be heard at all—a result that would be fraught with injury, confusion, and great embarrassment. The view I take is unquestionably a convenient one, and is, I think, sanctioned by law.

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This is sufficient to dispose of this case upon its special facts. I offer no opinion as to the effect of mere approval of a case stated apart from signature.

We answer the question put to us by saying that the determination of the magistrates in the premises is wrong, and that they should have made an order for possession.

J. G. T.

The respondent (George Robinson) appealed to the Court of Appeal (1).

Appeal.
1910.

April 20.

Longworth, for Robinson.

Powell, K.C. (with him, *D. J. O'Brien*), for Kean, raised the preliminary objection, that no appeal lay under 20 & 21 Vict. c. 40, s. 6, and cited *Harvey, Appellant*; *Copeland, Respondent* (2).

Longworth contended that the question on the appeal was whether any case under the statute had been stated; that the King's Bench Division had no jurisdiction to entertain the case; and that an appeal would lie from their order, under section 24 of the Judicature Act (Ireland), 1877.

THE COURT held there was no jurisdiction to hear the appeal, and ordered the case to be struck out.

Powell, K.C., asked for costs, citing *Guardians of the South Dublin Union v. Jones* (3).

THE COURT declined to make any order as to costs.

Solicitor for Kean: *Patrick Talion*.

Solicitor for Robinson: *W. J. M'Clenaghan*.

W. G.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 32 L. R. Ir. 419.

(3) 12 L. R. Ir. 358.

Appeal.
1910.
Jan. 19, 31.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN APPLICATION FOR ARBITRATION BETWEEN EDMOND O'NEILL, APPLICANT, AND THE BANSHA CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED, RESPONDENTS (1).

Employer and workman—Workmen's compensation—Dependant in part on workman's earnings—Mode of assessing compensation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) first schedule, s. 1 (a), (i., ii.).

A. died as the result of an accident arising out of and in the course of his employment with the respondents, with whom he had worked for a period of six weeks, earning £1 5s. a week, with the prospect of a bonus. For a period of three years prior to his entering the respondent's employment A. had been employed elsewhere at 10s. a week, during which period he resided with his father, the applicant, to whom he paid his wages, and who supported A. out of such wages at a cost of 7s. a week. During his employment with the respondents A. resided alone, and supported himself at a cost of 12s. a week, but at the end of three weeks he paid the applicant the sum of £1 10s., and the latter, after A.'s death, received from the respondents the sum of £2 10s., the balance of A.'s wages then due.

On the hearing of an application for arbitration under the Workmen's Compensation Act, 1906, the County Court Judge awarded the applicant compensation as a partial dependant, calculated at 3s. a week for 150 weeks in respect of A.'s former employment, deducting from A.'s wages of 10s., 3s. for cost of his maintenance, and 10s. a week in respect of his employment with the respondents.

Held, by the Court of Appeal (THE LORD CHANCELLOR and HOLMES, L.J., CHERRY, L.J., dissenting), that the County Court Judge, in estimating compensation to the dependant, "reasonable and proportionate to the injury," was entitled to take into consideration the amount of A.'s former earnings, and the proportion thereof expended on his maintenance, and that, as it was not shown that he had misdirected himself, the award should be allowed to stand. *Osmond v. Campbell and Harrison, Ltd.* ([1905] 2 K. B. 852), considered.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

APPEAL by the applicant against an award by the Judge of the Tipperary County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

Appeal.
1910.

O'NEILL
v.

BANSHA
CO-OP., & C.,
SOCIETY.

The applicant was the father of John O'Neill, who was killed by an accident arising out of and in the course of his employment by the respondent company. The wages received by the deceased workman, while in the employment of the respondents, were £1 5s. a week, with a right conditional on good conduct to a share of a possible bonus if the company made a profit during the year. It appeared that the bonus received by the deceased's predecessor in the said employment amounted to £6 10s. for the last year, and £3 10s. for the year before. The deceased workman had only been in the employment of the respondents for six weeks prior to the date of the accident, but for three years previously he had been in the employment of a creamery company at Solaghead, where he was paid at the rate of 10s. a week. While at Solaghead the deceased lived with his father, the present applicant, to whom he handed all his wages, and who paid the cost of his support, amounting to 7s. or 8s. a week, out of such wages. When the deceased entered the employment of the respondents, he ceased to reside with his father, and lived at Bansha, where he paid for his own support at the rate of 12s. a week; after he had lived at Bansha for three weeks he handed the applicant 30s., and after the death of the deceased the applicant received from the respondents the sum of £2 10s., the balance of wages then due to the deceased.

The learned County Court Judge held that the applicant, who was in constant and good employment, was partially dependent on the deceased, and awarded £30 10s. compensation, which was computed as follows:—As the deceased had handed the applicant his wages during the time he worked at Solaghead, the Judge awarded 3s. per week (*i.e.*, 10s. less by the estimated amount of the deceased's keep) for 150 weeks; for the six weeks the deceased worked at Bansha he awarded 10s. a week; and he further awarded £5 for funeral expenses. The applicant appealed to the Court of Appeal.

Appeal.

1910.

O'NEILL

v.

BANSHA
Co-OP., & C.,
SOCIETY.*Hanna*, for the appellant:—

It is submitted that the learned County Court Judge, in assessing the amount of compensation to be paid to the applicant as partially dependent upon his son's earnings, acted on a wrong principle. He should not have made a deduction from the deceased's former earnings in respect of his maintenance: *Osmond v. Campbell and Harrison, Limited* (1); Beven on Workmen's Compensation, p 549; and, further, in assessing the compensation, he should have taken as the basis of the award, not the weekly sum of 10s. formerly earned by the deceased, but his weekly earnings at the date of the accident: Workmen's Compensation Act, 1906, first schedule, sect. 1 (a) (i). That clause, although dealing with total dependency, is to be read along with clause (ii), which deals with partial dependency, and in assessing compensation in respect of the latter, new considerations, inapplicable to the former, are not to be applied. See judgment of Collins, M.R., in *Osmond v. Campbell and Harrison, Limited* (1), *supra*, at p. 857. [He also referred to *Kerr and others v. Smithfield Flax Spinning Company* (2).]

W. M. M'Grath, R.C., and *Louis Kelly*, for the respondents:—

There are marked distinctions between clauses (i) and (ii) of section 1 (a) of the schedule to this Act, which are independent. Clause (i), dealing with total dependency, prescribes both a maximum and a minimum sum for compensation; clause (ii) prescribes neither, but, in default of agreement, the amount of compensation in respect of partial dependency is to be "reasonable and proportionate to the injury" to the dependant. The County Court Judge has awarded such a sum; his decision cannot be reviewed by this Court unless he has misdirected himself, and it has not been shown that he has done so. No standard of compensation can be laid down for such a case as the present. See judgment of Lord Halsbury, L.C., in *Main Colliery Company v. Davies* (3). The judgment of Collins, M.R., in *Osmond v. Campbell and Harrison, Limited* (1), has not the effect contended for; the

(1) [1905] 2 K. B. 852.

(2) 36 I. L. T. R. 124.

(3) [1900] A. C. 358, at p. 362.

passage relied on was a dictum only, and in any case, that judgment is not binding on this Court.

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In this case the applicant was only partially dependent on the deceased, John O'Neill, his son, and, therefore, the compensation to which the applicant was entitled was assessable under clause (ii), sect. 1 (a), of schedule 1 to the Act, though for the purpose of acting under clause (ii) the first clause must be read along with it.

The first clause prescribes a maximum which cannot be exceeded in acting under clause (ii); but, subject to that, the statutory duty of the Court or arbitrator is to award "such sum as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants."

Thus, the elements to guide him are the exercise of the wide discretion given him, having regard to all the circumstances and the loss which the dependant has sustained by the death.

The amount may in some cases approach very near to the maximum mentioned in clause (i), but in others it may fall far below it.

It was said that in *Osmond v. Campbell and Harrison, Ltd.* (1), a rule has been laid down by the Court of Appeal which must be applied in every case. No doubt, the Master of the Rolls, Lord Collins, in that case, says:—"Then, when we come to the case dealt with by clause (ii), namely, that of partial dependency on the earnings of the deceased workman, the extent of the differentiation contemplated between that case and the case provided for by clause (i) appears to me to be that, the persons referred to in clause (ii) being persons who, instead of being wholly dependent on the deceased workman's earnings, were only partially dependent on those earnings, and had some other source of maintenance, the compensation is to be modified to the extent of taking into consideration that other source of maintenance. I do not think that it could have been intended, through the loophole afforded by that difference between the two cases, to open up, for the purpose of assessing compensation under clause (ii), a vista of entirely new

(1) [1905] 2 K. B. 852.

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considerations, which would have been inapplicable in cases coming within clause (i).” I do not think Lord Collins intended to lay down by those words a rule which would be the sole test applied in every case. I rather think he was dealing with considerations which it was argued should be taken into account, but which he states were inapplicable in cases coming within clause (ii). If he meant to lay down an absolute rule, I would not be prepared to follow his dictum, though, of course, we are bound by the actual decision itself in *Osmond v. Campbell and Harrison, Ltd.* (1), in which the decision of the County Court Judge was adopted, and the Court disclaimed in the strongest way any interference with the County Court Judge who exercises the discretionary powers under clause (ii), unless they clearly see he has acted on some wrong principle. The question is, ought we to send this case back to the County Court to award in the terms of clause (ii) what is reasonable and proportionate to the injury to the partial dependant? He has told us in terms that he has done that, and I am unable to see that any useful purpose is to be served by remitting it to him. He seems to have followed the practice adopted by the Recorder of Belfast in numerous cases which were accepted as binding.

I think the appeal should be dismissed, but, under all the circumstances, without costs.

HOLMES, L.J.:—

The applicant for compensation in this case is the workman's father, who is found by the County Court Judge to have been partially dependent upon the workman's earnings. It was therefore the duty of the Judge to determine the sum of money that would be reasonable and proportionate to the pecuniary injury to the father arising from the death of the son.

There is a marked contrast between the language of clause (i) of section 1 (a) of the first schedule to the Act of 1906 and clause (ii). The one relates to the amount of compensation payable to a dependant wholly dependent on the earnings of the workman who has lost his life, and is very definite in its terms. It prescribes

a maximum of £300 and a minimum of £150; and within these limits it fixes the amount of compensation at a sum equal to the workman's earnings during the three years next preceding the injury if the workman has been in the employment of the same employer during that period; and if his service under the same employer has been less than three years, at a sum equal to one hundred and fifty-six times his average weekly earnings while so employed. The amount is thus made a matter of arithmetical calculation, and is not proportionate to the injury to the dependant.

Under clause (ii) the amount is to be calculated in a different way. The maximum of £300 is retained, but the minimum disappears; and the only guide is that the amount is to be reasonable and proportionate to the injury. This provision seems to give a wide discretion to the Judge; and I am unable to see how he would get any substantial help from ascertaining in the first place the amount to which the applicant would be entitled if he were wholly dependent. In some cases, what is reasonable and proportionate ought to come very near such amount; in others, it ought to fall far short of it. The present case is of the latter class. The applicant has been in continuous employment as an engine-driver at good wages; and until a short time before the accident, he benefited, according to the Judge's calculation, at the rate of 3s. a week from his son's earnings; and during the last few weeks to a still larger extent. Accordingly, the Judge awarded an amount equal to these sums for three years. This seems to me a reasonable mode of arriving at the sum payable; and is in accordance with the practice of the late Recorder of Belfast, whose experience in workmen's compensation cases was much the largest in Ireland, and from whom there has been no appeal on this point. I am far from saying that there may not be other methods of calculation equally good, or even better; but I am satisfied that no fixed principle can be laid down as applicable in all cases. The appellant relies on *Osmond v. Campbell and Harrison, Limited* (1). That was a case in which the compensation ought to have come very near what would have been given if the applicant had been wholly dependent, as the only

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supplement to what she received from the earnings of the workman was some small sums obtained by casual labour.

The Judge, therefore, arrived at the amount of compensation by deducting from what would have been payable, if the applicant had been wholly dependent, a very small sum; and I have no doubt he was quite right. His decision was affirmed, but reliance has been placed by the appellant in this case upon some sentences of Collins, L.J., in giving judgment, which are said to lay down a principle applicable to every case. I think that he did not intend to do so; but if he did, I am unable to agree with him, as I fear that any attempt to follow such a principle would lead to confusion.

If we were to send back this case to Judge Moore, with a direction to act on the principle suggested, the result would probably be, and I think ought to be, that he would arrive at the same amount by a different mode of calculation. Instead of calculating the amount on the basis of the weekly pecuniary benefit received by the applicant from his son's earnings for three years, he would first calculate, in the manner provided by section 1 (a) (i), the compensation to be paid if the father had been solely dependent, and he would then deduct therefrom the excess over the benefit actually received. Thus the same result would follow from either mode of calculation.

CHERRY, L.J.:—

I regret that I cannot concur in the decision of the other members of the Court. The question, and the only question, raised upon this appeal is as to the principle upon which compensation in the case of partial dependency is to be assessed under the Act.

The applicant was the father of John O'Neill, who was killed by an accident arising out of and in the course of his employment by the respondent company. It was proved that the wages received by the deceased while in the employment of the respondents were 25s. a week, with a possible bonus at the end of each year, but that he had been in the employment of the respondents only for six weeks prior to the accident which caused

his death. For three years previously he had been in other employment, receiving wages at the rate of 10s. a week only.

The learned County Court Judge found as a fact that the applicant was dependent, but only partly dependent, on the deceased, and awarded him £30 10s. compensation. It appears from the newspaper report of the case, which the Judge states to be accurate, that he arrived at this sum in the following way :— While the deceased was in his previous employment he had given his father the whole of his wages (viz., 10s. a week), receiving in return his support in his father's house. The Judge estimated the cost of his support at 7s. a week, and allowed the balance 3s. a week to the applicant for 150 weeks. For the six weeks during which he was in the respondent's employment he allowed 10s. a week, being the amount which the deceased had actually given his father during the first three weeks of this period. His wages for the last three weeks were unpaid at his death. These two sums, with £5 for funeral expenses, made up the total sum, £30 10s., allowed. The applicant contends that in this calculation the learned County Court Judge proceeded upon a wrong principle, and that the case should be remitted to him for reconsideration.

The amount of compensation to be paid under the Act is laid down in the first schedule thereto. Clause 1 (a) (i) provides for cases where death results from the injury, and the workman leaves persons wholly dependent upon his earnings. In this event the ascertainment of the amount of compensation is a mere arithmetical calculation. It is to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300."

Sub-clause (ii) of the same clause provides for similar cases where the workman leaves persons only in part dependent upon his earnings, and lays down that the compensation in that event is to be "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under the Act, to be reasonable and proportionate to the injury to the said dependants."

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If we were called upon to interpret this latter sub-clause for the first time, without regard to authority, there would be a great deal to be said for the view that it left a very wide discretion to the arbitrator as to the method by which he was to calculate the amount of the compensation, and that he might reasonably take into account, as he did in this case, the cost of the maintenance of the deceased, and the wages which he was receiving in his previous employment; but it has been clearly laid down by the Court of Appeal in England that he has no such discretion, that sub-clauses (i) and (ii) of clause 1 (a) are to be read together, and that the compensation is to be calculated in the same way in both cases, modified only in the second case by taking into consideration other sources of maintenance possessed by the applicant. The judgment of Lord Collins, then Master of the Rolls, in *Osmond v. Campbell and Harrison, Limited* (1), is express upon this point. He says:—[His Lordship read the passage cited in the judgment by the Lord Chancellor, *supra*, p. 327].

In the same case, Mathew, L.J., also expressly laid down that for the purpose of construing the terms of clause (ii) of the subsection, they must be read together with clause (i).

We have been asked by the respondent's counsel to disregard these judgments, as not being binding upon us. It may be, as has been suggested, that they were not strictly necessary for the decision of the particular case before the Court. It would have been sufficient to have said, as Romer, L.J., did, that there was nothing to show that the County Court Judge awarded compensation on a wrong principle, in applying to a case under clause (ii) the rules laid down by clause (i); but I cannot regard the judgments of two such eminent Judges as Lord Collins and Mathew, L.J., as mere *obiter dicta*. I think that they intended to lay down, and did lay down, a principle for the calculation of the amount of compensation in cases of partial dependency, corresponding to that laid down by the schedule itself for cases of total dependency, and that such principle should be applied generally by the County Court Judges. The County Court Judge appears to me to have disregarded the rules laid down in one, if not in two, respects in

(1) [1905] 2 K. B. at p. 857.

the present case: first, in taking into account the wages of the deceased in his previous employment, and secondly, in making a deduction for maintenance from those wages.

The respondents also relied upon the decision of the House of Lords in *Main Colliery Company v. Davies* (1). But I cannot see that that case has any bearing upon the question of the amount of compensation payable. Lord Halsbury, in his judgment, expressly states that it has not (at p. 361). The only point decided in that case was that a father earning wages may be in part dependent upon the earnings of his child within the meaning of the Act, and that the question whether he is so or not is entirely one of fact to be determined according to the circumstances of each case.

For these reasons I think that the case should be remitted to the County Court Judge with directions to assess the compensation in the manner pointed out by Lord Collins and Mathews, L.J., in *Osmond v. Campbell* (2). It is stated that the applicant in this case is in constant and good employment. To what extent the amount of compensation payable is to be reduced by taking into consideration his other sources of maintenance, it would be for the County Court Judge in his discretion to determine. He is to fix such sum as, in the words of the schedule to the Act, shall be "reasonable and proportionate to the injury" to the dependant. But the basis of the initial calculation should be, I think, the scale provided for cases of total dependency.

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Solicitor for the appellant: *R. B. Heuston.*

Solicitor for the respondents: *M. Good.*

R. ST. J. C.

(1) [1900] A. C. 358.

(2) [1905] 2 K. B. at p. 852.

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1909.

May 6,
10, 11, 12.
Nov. 30.

Appeal.

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Jan. 26, 27.
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ANDERSON v. CLELAND (1).

(1908. No. 7531.)

*Lease—Construction—Reservations and exceptions—Purpose of demise—
“Water-course”—Natural stream conveyed partly through culvert—
Ownership of culvert—Obligation on lessor as owner of culvert to keep
same in repair, notwithstanding absence of any covenant by him to do so—
Damages for injury by flooding.*

A lease for twenty-one years of demesne lands to be used as a dairy or pasture holding, and expressed to be made for the lessor's temporary convenience pending the development of the land for building purposes, excepted and reserved to the lessor, for his exclusive use and benefit, *inter alia*, “rivers and rivulets, lakes, pools, water, and water-courses, and roads, with all necessary power and dominion over the same, with power to the lessor to divert, embank, and apply the said rivers, . . . water, and water-courses, as the lessor should see convenient or expedient to direct and appoint, and also excepting and reserving unto the lessor all and every such reasonable roads and ways to . . . springs, wells, and places of watering cattle, as have formerly been used, or shall hereafter be found necessary or useful to the lessor.”

Four natural streams converged at a point near the middle of the demised lands, and were conveyed thence by an artificial channel or culvert. There was no covenant in the lease imposing the obligation to keep this culvert in repair upon either lessor or lessee, but there were covenants by the lessee at the end or sooner determination of the term to deliver up the premises, and, *inter alia*, “all water-courses” in good repair and condition. There was a clause in the lease empowering the lessor on demand to take up possession of the whole or any part of the demised lands for the purpose of building.

Held, in the King's Bench Division by Boyd and Kenny, JJ., *diss.* Dodd, J., that on the true construction of the lease the flowing water merely, and not the culvert, was reserved to the lessor.

Held, by Dodd, J., and by the Court of Appeal, that the culvert was reserved to, and was the property of, the lessor, who was therefore as regards the lessee, who occupied the position of an adjoining owner, bound to maintain the culvert in such a state of repair as would prevent damage to the lessee by flooding.

The culvert having collapsed on three occasions from obstruction and want of repair, and the lands having been in consequence flooded and seriously

(1) In the King's Bench Division, before BOYD, KENNY, and DODD, JJ.

damaged, a special jury who viewed the lands awarded the lessee £300 damages. *K. B. Div.*
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In the absence of any ground for supposing that the amount awarded was unreasonably out of proportion to the damage actually caused, the Court of Appeal, affirming the view taken by Dodd, J., refused to disturb the verdict on the ground that the damages were excessive merely by reason of the clause for resumption of possession by the lessor on demand. ANDERSON
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ACTION for negligently, and in breach of duty and agreement (1), omitting to cleanse and maintain a water-course alleged to be the property of the defendant, under the exceptions and reservations in a lease dated the 16th May, 1904, made between the defendant of the one part, and the plaintiff of the other part, by reason of which the lands of the plaintiff were flooded. The plaintiff also claimed an injunction.

The defendant traversed all the allegations in the statement of claim, contended that no cause of action in point of law was shown, and counter-claimed for damages in respect of certain alleged breaches by the plaintiff of covenants in the said lease. The questions arising on the counter-claim are not proposed to be dealt with in this report, which only relates to the issue raised in the original action.

The case was tried before Gibson, J., and a common jury in Belfast, at the Ulster Winter Assizes, 1908, when the jury, who viewed the lands, found a verdict for £300 for the plaintiff in the original action, and a verdict for £40 for the defendant on the counter-claim.

The question in the original action was whether the duty of maintaining the water-course in proper repair and condition lay on the plaintiff or on the defendant; and this turned on the construction of the lease.

This lease, which demised to the plaintiff part of Stormont Castle Demesne, known as Castlehill, containing 117A. 3R. 25P., to be used as a dairy or pasture holding, commenced by a recital that it had been admitted by the lessee, as between himself and the lessor, that the lands were building lands, and that the lessor

(1) It was admitted before action by the plaintiff that he did not rely on an agreement as imposing liability on the defendant.

K. B. Div. had agreed, "for his own temporary convenience, pending the
1909. construction of roads and avenues, and the general development
ANDERSON of said lands, and their permanent letting for building purposes,"
v.
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The demise of the lands was made "excepting and always reserving out of this demise unto the lessor, for his exclusive use and benefit, all manner of game, fish, and royalties whatsoever, and all mines, beds, pits, and quarries of coal, iron, lead, and copper, and all other metals and minerals of whatsoever description, and all marble, freestone, limestone, slate, and other stones, and all manure called marl, fuller's earth, clay for making bricks and pipes, and gravel for building or other uses or purposes, and all timber and fruit trees, wood, underwoods, bog-timber, and wood, underground moss, and turbary for cutting and making turf, and rivers and rivulets, lakes, pools, water, and water-courses, and all necessary power and dominion in every respect over the same; and also reserving to the lessor power and liberty to divert, embank, and apply the said rivers, rivulets, lakes, pools, water, and water-courses in such manner as the lessor shall see convenient or expedient to direct and appoint, and also excepting and reserving unto the lessor all and every such reasonable roads and ways to . . . springs, wells, and places of watering cattle, as have formerly been used, or shall hereafter be found necessary or useful to the lessor."

The term of the lease was twenty-one years from the 1st of May, 1904. The rent reserved was as follows:—For the half year ending 1st of November, 1905, £117 15s.; for the next four years £235 10s. annually; for the next six years £265 annually; and for the remainder of the term £294 16s. 4d. annually.

The lease contained a covenant by the lessee to "keep in repair, and preserve in good order, repair, and condition all the fences, roads, walls, paths, and sewers that now are upon or in said premises, or that hereafter be made in, through, or over the premises hereby demised, or intended so to be, and so deliver up the said roads, walls, paths, drains, sewers, and all ditches, gates, stiles, hedges, banks, bridges, water-courses, and enclosures in, upon, or around the said premises in good order, repair, and condition, at the end or sooner determination of this demise."

There was a further covenant (*inter alia*) by the lessee as follows:—"That the lessee shall and will, at the end or sooner determination of this demise, deliver up all the said premises, and all additions and improvements thereon, together with all the fixtures, gates, stiles, hedges, ditches, banks, bridges, drains, water-courses, fences, and enclosures for the time being, upon or belonging to the said premises or any part thereof, except such fixtures and buildings as the lessee shall be entitled to remove under or by virtue of any Act of Parliament, and which the lessor shall not have elected to purchase, in such good and complete repair as aforesaid, and in all respects in such state and condition as shall be consistent with the due performance of all the covenants and conditions hereinbefore contained, and on the part of the lessee to be done and performed."

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The lease contained a clause empowering the lessor at any time on demand, without any previous notice, to take up the whole or any part of the lands which might be required or demanded for building purposes, or for the construction of roads or avenues for the development of the land for building purposes.

Four natural open streams flowed through portions of the demised lands, and from a point about the middle of the lands were conveyed through a covered water-course, or culvert, in a south-westerly direction to the southern boundary adjoining the Upper Newtownards Road.

Evidence was given (practically uncontradicted) that the culvert became obstructed, and that it collapsed on three occasions, May, 1907, October, 1907, and December, 1908. Very serious flooding of the lands took place, which the jury found was, to a substantial extent, caused by the obstructions in the culvert for which the defendant was to blame, and which he should have removed. The learned Judge held that the burden of keeping the culvert in repair lay on the defendant, and so instructed the jury, notwithstanding the requisition of the defendant's counsel, who asked for a direction on this point in the defendant's favour.

The defendant moved to set aside the verdict for the plaintiff in the original action, and to enter a verdict for the defendant on the ground that on the pleadings and on the true construction of the lease the plaintiff had no cause of action, and in the alternative

K. B. Div. for a new trial of the original action on the grounds (*inter alia*) of
 1909. misdirection and non-direction by the learned Judge, and that the
 ANDERSON damages were excessive.

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Ronan, K.C., and *D. M. Wilson, K.C.* (with them *Pigot*), for the defendants.

Bates, K.C., and *Moore, K.C.* (with them *Andrews*), for the plaintiff.

Nov. 30.

Dodd, J. :—

This is an application that the judgment, verdict, and findings at the trial be set aside, and consequent relief granted. The findings in the original action and on the counter-claim are challenged. The notice of motion covers every conceivable point on which findings can be challenged, and there is also what amounts to a general demurrer to the entire cause of action.

The plaintiff's cause of action, apart from pleading, would seem to be for the flooding of his lands. The cause of the flooding is the obstruction of a culvert. There were collapses of the culvert in May 1907, October, 1907, and February 25th, 1908. There was substantially no controversy that the flooding was, at any rate, in part due to the condition of the culvert. The culvert itself is underground. The date and origin of it are unknown. The lands underneath which the culvert is were demised by the defendant to the plaintiff by a lease dated 16th May, 1904. The culvert does not run through the entire of the lands. The water, through portion of the way, is conveyed by an open channel, or open channels, also artificial, into the culvert; and the water emerges from the culvert at a point below the lands demised to the plaintiff. The water conveyed through the culvert is the water of four natural streams of water. Is the defendant responsible for the flooding? That is the substantial question in the original action.

Defendant's counsel ask, on what ground is he responsible? Is the action grounded on the relation of landlord and tenant? If so, where is the obligation in the lease upon the landlord to maintain this culvert? The words "breach of duty and agreement" had been inserted in the cause of action set out in the

endorsement on the writ. The defendant's solicitors pressed for particulars, and on November 17th, 1908, the plaintiff's solicitors wrote as follows:—

DEAR SIRs,

In reply to your letter of the 14th inst., with a view of removing all excuse for further delay, you may assume that the plaintiff does not rely upon any cause of action founded on breach of agreement; and that the breach of duty alleged in the statement of claim is the breach by the defendant of his duty as owner of the bed of the stream or water-course, and other hereditaments reserved or excepted by the lease.

The questions would then seem to be these—1. Who is the owner of the culvert? 2. If the landlord, in the absence of any agreement is it his duty to keep it in such a condition that it will not injure the lands he has demised to the plaintiff? The answer to the first question depends upon the construction of the lease. The lease grants to the plaintiff the lands "together with all the rights, members, incidents, appendances, and appurtenances to the said parcel of land and premises, or any part thereof, belonging or in any wise appertaining." It excepts and reserves to the lessor for his exclusive use and benefit, *inter alia*, all rivers and rivulets, lakes, pools, water, and water-courses, and all necessary power and dominion in every respect over the same, and also power and liberty to divert, embank, and apply the said rivers, rivulets, lakes, pools, water, and water-courses in such manner as the lessor shall see convenient or expedient to direct and appoint.

Is the culvert granted, or is it reserved?

Mr. Ronan urged that we should start by adopting the maxim that the grant is to be construed as against the lessor. He cited from Foa a passage to that effect: "In case of doubt, the words of an exception are, as in the demise itself, to be construed against the lessor, and favourably to the lessee." As this appears in the 4th edition, published in 1907, p. 101, it is said to contain the last word as to the authority of the maxim. There flashed across my mind as he cited this passage a criticism of a distinguished Judge on this side of the Channel which I had heard, and a comment which I thought I had read in the English Reports. The comment by the English Judge is to be found in a case cited

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K. B. Div. by Mr. Ronan for another purpose, *Taylor v. Corporation of St.*
 1909. *Helens* (1). That was a case upon the construction of a deed,
 ANDERSON and of a deed granting a water-course. The extract is on p. 270.
 v.
 CLELAND. Sir George Jessel, in commencing to give judgment, says:—
 Dodd, J. “Before doing so I will take the liberty of making an observation
 as regards a maxim quoted by Mr. Christie, and which is to be
 found, I believe, in a great many text books, and, I am afraid,
 also in a great many judgments of ancient date, and that is, that
 a grant, if there is any difficulty or obscurity as to its meaning, is
 to be read most strongly against the grantor. I do not see how,
 according to the now established rules of construction, as settled by
 the House of Lords in the well-known case of *Grey v. Pearson* (2),
 followed by *Roddy v. Fitzgerald* (3) and *Abbott v. Middleton* (4),
 that maxim can be considered as having any force at the present
 day. The rule is to find out the meaning of the instrument
 according to the ordinary and proper rules of construction. If
 we can thus find out its meaning, we do not want the maxim.
 If, on the other hand, we cannot find out its meaning, then the
 instrument is void for uncertainty, and in that case it may be
 said that the instrument is construed in favour of the grantor, for
 the grant is annulled.”

The Irish Judge to whom I allude was Mr. Justice Lawson. He was sitting as one of the Commissioners of the Great Seal, and he was commenting on what he described as a vicious method of trying in the first instance to seek for either rules of construction or reported cases to control the interpretation of the instrument to be construed. He said, “In the case of a will, find out what the testator meant from the will itself; in the case of a deed find out what the parties intended from the deed itself; and then set to work to find out if there is any maxim, or rule of construction, or reported case which will prevent you from carrying out the intention you have gathered from the instrument itself.”

Mr. Ronan might say that the cases referred to in the Lords as over-ruling decisions and altering text-books were cases on the interpretation of wills. He would be also right in saying that the

(1) 6 Ch. D. 264.

(2) 6 H. L. C. 61.

(3) *Ibid.* 823.

(4) 7 H. L. C. 68.

case in which Mr. Justice Lawson pronounced his view was also the case of a will; and he might with reason urge that a maxim embedded in decisions from the time of Coke, and repeated in text-books down to 1907, was too firmly fixed to be destroyed by a comment from a Judge, however distinguished. The truth is, it is not the maxim, but the application of it, that has been to any extent modified by the bent of judicial treatment. The maxim is only to be resorted to in cases of difficulty or doubt; and the tendency is to construe the instrument from within itself without falling back, perhaps as readily as formerly, on the benefit of the doubt.

Mr. Ronan cites *Bullen v. Denning* (1) as a case in which the maxim was applied, and in which the facts were analogous to those in the present case. The maxim, as stated there, is (p. 847)—“Where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception being the words of the lessor are to be construed favourably for the lessee and against the lessor.” The words of the exception in that case were, “All timber trees and other trees, but not the annual fruit thereof.” The question was, Were apple trees within the exception? But for the words “but not the annual fruit thereof,” the words of the exception would not include apple trees. The Court so decided. They held that apple trees would not pass under the word “trees.” The words that created the difficulty were, therefore, the words “but not the annual fruit thereof.” It was contended that those words implied trees that bore fruit in the ordinary sense of the term. The reasons for applying the maxim in that particular case were made luminously clear in the judgment of Mr. Justice Holroyd. He says, at p. 850:—“There are several authorities to show that the words *other trees* do not extend to fruit trees. If fruit trees are not included in the first part of the exception, and if the words of the exception are to be considered the words of the lessor, and to be construed in favour of the lessee, the question is, What is the effect of the saving words, ‘not the annual fruit thereof’? *They were intended to operate in favour of the lessee.* But it is argued, they shall operate against him by

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(1) 5 B. & C. 842.

K. B. Div. extending the exception. We cannot infer that to have been the
 1909. intention of the parties, if these words can have any other legal
ANDERSON effect consistent with the sense imposed by prior decisions on the
v. words 'timber trees and other trees'; and he finds accordingly
CLELAND. that fruit is frequently used to denote the produce, not only of
 orchard, but of timber trees, and concludes—"If that word be so
 construed here, the saving will not have the effect of operating
 against the lessee, by enlarging the exception."

Is there any resemblance between the facts of that case and the facts in the present case? The result would certainly be a curious one. The maxim operates in favour of the lessee. The ground on which it is based is the intention to benefit the lessee. Where is the benefit in this case? He is to have the burden of maintaining an underground culvert for the conveyance of water, which is not granted to him, but which is reserved for the exclusive use and benefit of the lessor. And that construction is to prevail as carrying out the intention of the parties, and as operating in favour of the lessee.

Is there any difficulty or doubt calling for the application of the maxim? and, if so, what interpretation favourable to the lessee is to be given in accordance with it?

The grantor reserved to himself all rivers, rivulets, lakes, pools, water, and water-courses, and all necessary power and dominion in every respect over the same.

Did he intend to reserve the water flowing in and through the culvert, while the culvert itself was granted to the lessee? I leave out of consideration the "rivers and rivulets, lakes and pools." I confine myself to the reservation of "water and water-courses, and all necessary power and dominion in every respect over the same." There was in existence at the time of the lease a culvert—an artificial structure in the nature of a built pipe, through which water flowed. The landlord reserves the water and water-course, that is, the water that flows, and the channel through which it flows. "It cannot be denied" (*Remfrey v. Surveyor-General of Natal* (1)) "that a water-course may mean, and, perhaps, the more natural meaning of it is, a channel in which water flows."

(1) [1896] A. C., at p. 560.

Mr. Ronan's construction is, as I understand it, "the water and the flow of water"; that seems a very artificial use of words. *K. B. Div.*
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No doubt, the words may have another meaning. Sir George Jessel, in the case cited (1), says:—"A grant of a water-course in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water; it may mean the channel, pipe, or drain which contains the water; and it may mean the land over which the water flows. Which it does mean," he goes on to say, "must be shown by the context; and if there is no context, I apprehend that it would not mean anything but the easement, a right to the flow of the water." He proceeds to apply those words to the facts of the case before him. "In the present case," he says (at p. 272), "the channel is an artificial channel made by man, and there was at the time of the grant an actual existing pipe or drain, in some parts covered over and in other parts open." And he proceeds—"In my opinion, from the context, the word 'water-course' in this document means that, and nothing else." *ANDERSON*
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From the nature of the context in the present case, and the nature of the grant, I cannot come to any other conclusion than that water meant water, and water-course the channel through which the water flowed.

Is there anything in the other part of the deed to control or modify this view? Counsel for the defendant say there is. They draw attention to the nature and extent of the demise. From the recital it was evidently in contemplation that the lands might be used as building lands. They are situated close to, if not within, the City Borough of Belfast. And by clause 31 in the lease the lessor was entitled to take up on demand the whole or any portion of the lands for building purposes, or for the construction of roads and avenues. The term in the lease was twenty-one years. But this clause made it practically (Mr. Ronan says) a tenancy-at-will. I am not quite sure that I appreciate fully this part of his argument. It seems to be addressed to the improbability of the landlord under such circumstances entering into an obligation to maintain this structure. But the case is not based on contractual

(1) 6 Ch. D. 264, at p. 271.

K. B. Div. relations, nor on covenant. And if the probability is great that
 1909. the landlord would not for so uncertain a term incur an obligation
ANDERSON to keep this culvert in order, is there not an even higher proba-
v. bility in favour of the tenant that he did not incur an obligation
CLELAND. to keep an underground channel in repair for the exclusive use
 Dodd, J. and benefit of the landlord if he could be turned out of the entire
 holding without a moment's notice? The argument for the
 plaintiff is, the plaintiff could not touch this without being a
 trespasser, and he has no dominion over the water, nor over the
 culvert. Counsel for the defendant also urges that there was no power
 reserved to the lessor to enter for the purpose of maintaining the
 culvert. A right of entry would be implied, if necessary; and if
 such a right is needed, it is found in the words "full power and
 dominion."

If I held, as I am given to understand that Mr. Justice
 Kenny is going to hold, that there was only an easement to the
 landlord of the flow of the water, it would, I think, follow from the
 decisions on that point and from the very words of the reservation,
 that the lessor had power to enter to keep the water-course clear,
 and I think the power brought with it the duty (see *Geddis v.*
Bann Reservoir Co. (1); *Bligh v. Rathangan Drainage Board* (2)),
 unless the plaintiff had by contract or covenant undertaken to
 relieve him from the duty. But I do not further press this. The
 case was argued upon a different basis. I use it for the purpose
 of confirming my opinion on the point argued. The next provi-
 sion in the deed that is called in aid is the provision (15)
 that the land is to be used as dairy or pasture land. And that
 does seem absurd. The landlord reserves all water and water-
 courses; and the tenant is under an obligation to use the farm as
 a dairy or pasture farm. But this anomalous provision does not
 help the defendant. For clearly, in any view, the water is the
 landlord's. Whether, in the event of a dispute upon the covenant,
 the Court would infer an implied covenant on the part of the
 lessor to grant out of the water he had previously reserved to him-
 self a sufficient supply for purpose of cattle or dairying, I cannot
 say. But the clause does not help us upon the ownership of the

water-course, except in so far as it shows what hardly needed showing, that the deed is not a masterpiece of draftsmanship. The next clause sought to be called in aid is clause 20. The clause contains a covenant on the part of the tenant during the lease to keep in repair and preserve in good order, &c., all the fences, roads, &c., and so deliver up "the said roads, &c., and all ditches, gates, stiles, hedges, banks, bridges, water-courses, and enclosures, in, upon, or around the said premises, in good order, repair, and condition at the end or sooner determination of this demise."

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There is no covenant to keep water-courses in repair during the lease (Mr. Ronan admits); but there is a covenant to deliver up water-courses in good order and condition, and the tenant cannot deliver up what he has not got. The word from the context must here mean, he says, physical structure, not the flow of the water; and to make the deed consistent the words "water-course," in the exception, must get the meaning "the flow of the water," and then the structure would pass as being included in the grant, and not excepted by the exception. If we were to fall back upon maxims, this construction would violate a good many. It gives to the same word a different meaning in the same deed; it makes an ambiguous covenant control the operative part of the grant. It makes the covenant to deliver up more extensive than the covenant to maintain. But Mr. Ronan says it is here that his maxim applies. It is this clause which makes the meaning of the deed doubtful, and, therefore, it is to be construed against the grantor; and it is to be construed against the grantor by relieving him from the maintenance of the culvert.

I will not pause to suggest possible water-courses that might be caught by that covenant. I adopt the construction of the learned Judge at the trial. "The final covenant relating to the premises at the end of the lease did not seem to me, with sufficient certainty, to control the rest of the lease, and to make the lessee liable during the term for such an expensive and hazardous obligation." And for myself I cannot, from anything in the lease, arrive at a conclusion that this barrel-pipe was intended to be in the possession or under the control of the plaintiff.

The defendant's counsel here did not concede that, if we found

K. B. Div. the ownership of the culvert to be in the lessor, the action is 1909. necessarily maintainable. The argument then runs something like this—True, there is no covenant on the part of the tenant to maintain this culvert. But neither is there one on the part of the landlord. The ownership of the culvert does not determine duty. The tenant took the land as it was, culvert and all, and there is no implied agreement relied on; and no covenant; and, apart from contractual relation, there is no duty.

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But if a stranger, by obstructing the flow of the water below this farm, as actually occurred, had penned back the water, he would have been liable. If an adjoining owner, either alongside or above the plaintiff, had caused water to flow upon the plaintiff's lands, he would have been liable. And it is not the less actionable because the person who causes the injury is the plaintiff's own lessor, and the water-course, which is the origin of the injury, runs under the lands demised. The plaintiff's counsel find the legal obligation stated in the mode in which they pressed their case in the judgment in the case of the *Grosvenor Hotel Co. v. Hamilton* (1). A duty may spring up between the landlord and tenant, not founded upon actual agreement, but a duty springing up at Common Law from the relationship. It may be put in two ways. A landlord cannot derogate from his own grant: *Caledonian Railway Co. v. Sprot* (2), or it may be put on the ground of nuisance or trespass. Some members of the tribunal may base their judgment on the one view, some on the other. In the *Grosvenor Hotel Co. v. Hamilton* (1), Lord Lindley put the decision on the ground that a lessor cannot derogate from his own grant. Lopes, L.J., says:—"The defendant cannot obtain any relief founded on a breach of covenant. But what the plaintiffs have done has substantially interfered with the convenient occupation of the defendant's house, and such interference is a nuisance, and a cause of action." And Davey, L.J., says:—"I think the defendant has a cause of action founded, not on an implied covenant for quiet enjoyment, but on nuisance or trespass." In *Rigby v. Bennett* (3) it is put on the implied obligation. Mr. Justice Gibson says:—"If the lessee was not liable, I thought the lessor

(1) [1894] 2 Q. B. 836.

(2) 2 Macq. 449.

(3) 21 Ch. D. 559.

was under an implied duty not to allow this culvert to be obstructed by collapse, or to get into a state which would pen back the water, and create a nuisance, and injure the lessee in his enjoyment of the demised premises." I adopt his exposition of the duty, which admirably states the result of the authorities. I think I ought to add that the learned Judge reports that it was not disputed at the trial that, if the defendant's construction of the lease was erroneous, the defendant would be liable for the nuisance arising from the stoppage of the underground channel.

The verdict is also challenged as to amount. It is urged that, as an action was brought against Irwin, a person in occupation of land lower down than the plaintiff, for penning back the water, the jury were wrong in including all the damage. The answer is that the learned Judge himself, without suggestion from counsel, and apparently in opposition to their view, formulated questions for the express purpose of discriminating between the two causes of damage.

The amount of the verdict is further challenged as being excessive. Upon that the Judge reports—"The jury, who saw the premises, would be better qualified than I am to form an opinion, and I cannot say the damages were excessive." I gather that there were 117 or 118 acres in the entire farm. Having regard to the rent payable, to the extent of the area flooded, and the continuance of the flooding for so lengthened a period, I cannot say that the sum is excessive. The special juries of Belfast are discriminating in amount, and are not prone to extravagant figures, and I see nothing to make the amount awarded out of proportion to the injury sustained.

I am of opinion therefore that the verdict and judgment for the plaintiff on his cause of action should be upheld.

The remaining questions arise on the counter-claim. Every inch of ground is contested. The lease contained covenants on the part of the lessee, and the counter-claim is founded on breaches of these covenants. There were—(a) a covenant to drain; (b) a covenant to use the land as a dairy farm, so that there should not be less than three-fourths of the land in grass, either as permanent grazing, or in grass and clover following a white crop, and so that the rotation of cropping according to the proportion aforesaid

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K. B. Div. should be regularly conducted so as to maintain the lands effectively as a pasture and dairy farm; (c) a covenant to erect a good and sufficient wire and post fence round the outside boundary and internal division of the premises where the same was not sufficiently protected and divided by existing fences and divisions; and (d) a covenant to put the dwelling-house and offices in repair fit for habitation to the satisfaction of the lessors' agent.

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The farm at the time of the lease was in a bad state. There were 40 acres water-logged, and overgrown with rushes, and most of the rest of the land had been run out in tillage. The landlord and tenant were brought together in the former action against a man called Irwin for flooding; and the flooding of the land practically prevented the farm from being brought to the condition described as a dairy farm. No complaint was made till this action was brought. The landlord declined to spend anything on repairing the culvert, on the ground that the sum recovered from Irwin all went in costs. There was no detailed evidence given at the trial of any place where drains could profitably have been put down in the then circumstances of the farm.

There was evidence that the fencing had not been done within the time stipulated for in the lease, or at all.

There was evidence both ways as to the buildings. There was no evidence on the part of the defendant as to any amount by which the landlord's reversion was depreciated in value in consequence of any of the breaches. The jury were left without any assistance on this point. No objection was made to the Judge's charge, which was on the lines laid down in *Metge v. Kavanagh* (1). The jury had viewed the place. They found in their own way on each head of claim. The Judge asked, Was there a breach as to (a) (the drains)? The jury said "No, it was useless to drain, no breach"; and as to (b) (the dairying covenant), they said "no breach," and there was evidence from which they could arrive at the conclusion that the plaintiff was bringing in the land under the covenant; (c) as to the fencing covenant, they said "failed to erect fence, landlord no loss"; (d) as to the buildings, they found "dwelling-houses not in good repair, office houses in good repair. Damage for the dwelling-house, £40."

Reading the answers in a plain and ordinary meaning, they seem to me to be discriminating. I should have expected a finding of some damage for not fencing; but the jury were better judges of whether the non-fencing of a farm such as this is, situated as it was, depreciated to any extent the landlord's reversionary interest. The wording of the answers shows that they had intelligently followed the Judge's charge, as to the principle on which damages should be assessed. They found, as I think, clearly enough. There is a breach, but there is no damage. To summarize—as to (a) and (b), no breach; as to (c), breach, but no damage; as to (d), breach and £40 damages.

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I think the mere setting out in order of the answers is sufficient to show that the jury appreciated their duty; and I am of opinion their findings cannot be successfully challenged. I am of opinion, therefore, that the judgment given by the learned Judge on the findings should stand, and that this motion should be dismissed with costs.

KENNY, J.:—

It is not surprising that there should be a difference of opinion amongst the members of the Court as to the true construction of this ill-drawn lease. It reveals so many ambiguities and inconsistencies, particularly with reference to the water-course which is the subject-matter of the action, that it is difficult to feel confidence in any determination that one may come to as to its meaning; and I confess that my mind has fluctuated considerably, not only during the argument, but since judgment was reserved. The circumstances under which this lease was executed in May, 1904, are plain and simple enough. The lands demised consist of 118 acres, forming part of Stormont Castle demesne. There was a dwelling-house on the lands, which were situate partly in the county of Down and partly in the County Borough of Belfast. From the map that has been given in evidence, the lands appear to be bounded on two sides by county roads, and, as between the parties to the lease, it is admitted that they are building lands and that the letting was to be merely a temporary one, pending the general development of the property and the making of lettings

K. B. Div. for building purposes. The lease was for twenty-one years, free
1909. of rent for the first year,—then at a rent of £235 10s. for four
ANDERSON years,—£265 for the six following years,—and £294 for the residue
v. of the term. Power was reserved to the lessor to at any time take
CLELAND. up—on demand—without notice, the whole or any portion of the
Kenny, J. lands, if required or demanded, for building purposes; and there
were covenants by the lessee for fencing and draining, to put the
dwelling-house and out-offices into good repair, to keep same
insured, and to use all the lands as a dairy or pasture-farm. This
was the character of the lease, from which it is evident that,
though of a temporary nature and capable of being determined
at any moment—almost at the caprice of the lessor—very onerous
terms were imposed on the lessee, with, however, one advantage,
that he escaped payment of any rent for the first year of his
tenancy. The only additional circumstance necessary to be stated
for the elucidation of the point at issue in the case is, that a
natural stream of water passed through the lands, partly through
an open channel and partly through an underground culvert
which was concealed from view. The action was brought for the
flooding of the plaintiff's lands by reason of this culvert having
become choked. The main question for our decision was, whether
on the true construction of the lease the defendant was liable for
this condition of the culvert and the consequent injury to the
plaintiff in respect of which the jury assessed damages at
£300.

If not only the easement of the right of flow of the water, but
the culvert itself, is excepted to the defendant out of the demise,
and if the covenant to give up in repair casts no liability on the
plaintiff, I entertain no doubt that the defendant would be liable
for obstructions in the culvert and the consequent flooding of the
plaintiff's lands, and I do not propose to discuss the law bearing
on this point. What we have to decide is, whether, on the con-
struction of the lease, that is the true position. The question turns
on the meaning of the exception and the covenant.

The lease is so uncertain and so contradictory in many of its
main provisions that it is almost impossible to give it a coherent
interpretation, or to apply to its language those rules which con-
stitute the usual guides to construction. There is no regularity

of scheme or design on the face of it to which one could refer for *K. B. Div.* assistance. The land which is the subject-matter of it is admitted, *.1909.*
under the hands of the parties, to be building ground liable to be *ANDERSON*
taken up at any moment for building purposes; and the tenure *v.*
conferred on the plaintiff is consistent with that object, for, *CLELAND.*
although the nominal term is for twenty-one years, the plaintiff *Kenny, J.*
is bound to surrender the whole or part of the land on demand
at any time, if the same be required for building purposes. On
the other hand, there are stringent covenants on the part of the
lessee to use and maintain the lands as a pasture or dairy farm ;
to from time to time drain them effectually; to put the dwelling-
house and out-offices in repair within six months from the date of
the lease, and within twelve months to erect a sufficient wire and
post fence, where required, round the outside boundary and
internal divisions of the lands, and also to erect gates at the
several approaches to the county roads. So that it was quite
within the power of the defendant, at any moment, after the
heavy expenditure contemplated by these covenants, to determine
the lease and take up the lands without any compensation, if he
required them for building purposes.

The operative part of the lease demised the lands, together with
the dwelling-house and out-offices,—and then follow the exceptions
and reservations. These include all game, minerals, trees, turbary,
“rivers and rivulets, lakes, pools, water and water-courses, and all
necessary power and dominion in every respect over the same.”
These exceptions and reservations to the lessor are accompanied by
the words “for his exclusive use and benefit.” There is also
reserved to the lessor “power and liberty to divert, embank, and
apply “the said rivers, rivulets, lakes, pools, water, and water-
courses,” in such manner as he should see expedient. Then follow
an exception and reservation of “all and every such reasonable
roads and ways, in, through, and over the said hereby demised
premises to church or other place of worship, mill, kiln, or market,
bogs, mosses, springs, wells, and places of watering cattle, quarries,
sand, and gravel-pits, and elsewhere, as have formerly been used,
or shall hereafter be found necessary or useful to the lessor,”
and a power of entry on the demised premises for felling and
carrying away trees, and searching for minerals, and for the

K. B. Dir. purpose of viewing the condition of the premises, and for hunting and taking game, "and for all other reasonable purposes." This reservation to the lessor of all roads to (*inter alia*) the watering places for cattle is not unimportant, as indicating that the sides or banks of the open channel are vested in the lessee.

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Before approaching the other portions of the deed, it is important to note that "water and water-courses" are excepted to the lessor for his exclusive use; that express power is given to him to "divert, embank, and apply" them as he thinks expedient, and that all reasonable roads or ways to church "and elsewhere" are also reserved to him,—so that some of the arguments advanced with respect to the "water-courses," must necessarily be applicable also to roads. If the deed stopped at the close of the *habendum*, what quality would, as a matter of construction, be attributed to those three exceptions? Considerable stress has been laid on the rule which, I think, was always regarded as fundamental until questioned by Sir G. Jessel in *Taylor v. Corporation of St. Helens* (1), namely, that a grant, if there be any difficulty or obscurity in its meaning, is to be construed most strongly against the grantor. The rule could not, I think, be invoked in this case, unless there was a contention by the lessor that the channel or culvert did not pass to the lessee. The latter could not have the benefit of the rule both ways. He cannot have it for the purpose of enlarging the grant by restricting the exception, and also—if it suited him—for the purpose of restricting the operation of the grant by enlarging the exception. It cannot be applied for the purpose of getting rid of a burden which the enlargement of the grant would entail. I therefore proceed to consider the meaning of the words without reference to the rule.

Now, if the lease be considered apart from the covenants, could it with certainty be said that not only the easement to the flow of the water was reserved to the landlord, but that the channel and culvert were also excepted to him? It seems to me that, though the question is full of doubt, it ought to be answered in the negative. The purpose of the letting is the establishment or retention of dairy farming until building operations are

(1) 6 Ch. D. 264.

imminent, and the apparent exclusion of the lessee from the benefit of any ownership in this stream for cattle-drinking purposes and for drainage is *prima facie* opposed to the object of the demise. Starting with this, we ought to be cautious—indeed slow—in giving a meaning to the word “water-course” that would entail the vesting of the channel and culvert in the lessor. The primary signification of the word does not compel such a meaning. In *Doe d. Egremont v. Williams* (1), a case, in one aspect at least, not unlike the present, Coleridge, J., in giving judgment, says (at p. 700):—“Now, without saying that a water-course may *never* mean the channel in which water flows, it certainly *may* mean also the stream or flow of the water itself,” from which it is apparent that he regarded the former as a secondary meaning deducible from the context. Again, in *Taylor v. Corporation of St. Helens* (2), Sir G. Jessel, M.R., apprehends that the word without a context “would not mean anything but the easement, a right to the flow of the water”; and James, L.J., in the same case adds, “The word ‘water-course’ has no definite meaning in the English law as a description of a corporeal tenement. ‘Water-course,’ in its natural and ordinary meaning, is, as it implies, the course of water, and a grant of a course of water would be a grant of an easement, and not a grant of a corporeal tenement.” The only case to which we have been referred as throwing any doubt on the primary meaning of the word, is one in the Privy Council, *Remfrey v. Surveyor-General of Natal* (3), where Lord Davey, in the course of a not very exhaustive judgment, says:—“It cannot be denied that a ‘water-course’ may mean, and perhaps the more natural meaning of it is, a channel in which water flows.” He does not criticize *Taylor v. Corporation of St. Helens* (2), or even refer to it, though it appears to have been cited; and I would gather that his observation as to the “more natural meaning” of the word was not intended to be put in conflict with the remarks of Sir G. Jessel and James, L.J., if indeed it was intended to be more than a mere *obiter dictum*. If, then, the original signification denotes merely an easement of flow, does the context down to the end of

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(1) 11 Q. B. 688.

(2) 6 Ch. D. 264.

(3) [1896] A. C. 558.

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the *habendum* enlarge the meaning so as to include the channel? Whatever its character, it is reserved for the lessor's exclusive use and benefit, with liberty to him "to divert, embank, and apply" it. I cannot but think that this language is quite as appropriate to the easement of flow as it would be to the corporeal tenement. If, then, the word has reference in this part of the deed only to an easement, or if there be, as I think there is, doubt and obscurity as to the meaning, it becomes necessary to read the deed as a whole, and consider whether the lessee's covenants throw any light on the construction.

The lessee covenants to keep in repair and to deliver up in repair. The covenant to keep in repair is conversant with fences, roads, walls, paths, and sewers, and the covenant to deliver up in good repair relates in the first instance to roads, walls, paths, sewers, drains, ditches, gates, stiles, hedges, banks, bridges, water-courses, and enclosures, and, by a supplemental and somewhat superfluous covenant, is extended to fences and fixtures. This supplemental covenant also includes all the items enumerated in the previous covenant for delivery, except roads, walls, paths, sewers, and ditches. The result of these peculiar clauses is that, while the exceptions and reservations include water-courses and roads, the covenant to keep in repair makes no mention of water-courses, though it does of roads, and the covenant to deliver up includes both roads and water-courses. Again, the covenant to keep in repair does not deal with drains, ditches, gates, stiles, hedges, banks, bridges, enclosures, or fixtures, while the covenant for delivery in good repair, refers to all of them. There is a covenant to drain, yet no covenant to keep the drains in repair, though there is one to deliver them up in repair. This analysis of the clauses is enough to show with what little regard for system, plan, or arrangement the document was drawn, and to weaken, if not to displace, any argument founded on a different enumeration in the two covenants. So far as the term "water-course" is concerned, what meaning is intended to be given to it in the covenant for delivery? It must mean some tangible, physical thing, capable of repair and of delivery. If I assume that the culvert and channel are within the exception and remain vested in the lessor, what is there that is capable of repair and of delivery

by the lessee? Unless he gets the corporeal entity there is nothing for the covenant to operate on. If his only right was the implied one claimed for him of watering his cattle at the water-course and emptying his drains into it, the covenant would be nugatory, unless it could be read as having for its subject-matter a channel and a culvert which were the lessor's property,—a construction which I do not favour. The covenant evidently refers to something which has passed to the lessee, and which is within his control. It is a cardinal rule of construction that the Court should endeavour, if possible, to give a meaning reasonable and consistent to every word of the deed, and I am sensible that in construing this covenant as referable to the channel and culvert I offend against that rule in one respect, inasmuch as I am thereby giving the word an interpretation different from that which, according to my view, it has already received in the exception, namely, the right to the flow of the water. But the rule is not an absolute one. If possible, words *ought* to be so interpreted and a Court should struggle to do so; but if the context forbids it and compels a variable construction, the authorities show that the rule is not inflexible and, as is said in one case, is an uncertain guide. An illustration will be found in *Doe d. Egremont v. Williams* (1), where the very word “water-course,” occurring in two places in the same deed, received different interpretations. In *Clifford v. Koe* (2) Lord Selborne, dealing with the rule, says:—“Like many other such canons of construction expressed in general terms, it is very far from universal, and will always require a good deal of care in the application of it to particular wills.”

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That no doubt was the case of a will, but I apprehend that Lord Selborne's observation is applicable to the case of deeds. In *R. (Murphy) v. Justices of Weaford* (3) a section of the Irish Grand Jury Act was under consideration, and the Lord Chief Justice, in giving judgment, at p. 90, evidently assumed that the same word in the section and in a proviso might, if the context justified it, have different meanings. No doubt there is no covenant here on the lessee's part to keep the “water-courses” in repair

(1) 11 Q. B. 688. (2) 5 A. C. at p. 459. (3) [1894] 2 Ir. R. 81.

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during the term—but neither is there on the part of the defendant,—and in this action it is enough for the latter to show that there is no obligation on him. If the channel is vested in the lessee, a liability to keep in repair would arise. It is impossible to say what particular scheme—if any—the draftsman of this curious document had in his mind, or what inference can be drawn from the differences in the subject-matters of the two covenants. Fences, roads, walls, paths, and sewers, are the subject of the covenants to keep in repair and give up in repair. Drains, ditches, gates, stiles, hedges, banks, bridges, enclosures, and fixtures are all omitted from the former, while included in the latter; and there can be little doubt that almost all of these were certainly vested in the lessee. I therefore, am of opinion that, as between the two rules of construction, that which declares that every word in an instrument should be given a meaning is a safer guide in the present case than that which provides for identical meanings. In coming to a conclusion in favour of the defendant, I do not overlook the argument that weighed with Gibson, J., and which was forcibly used before us, that the language of the covenant was not sufficiently clear to cut down what counsel for the plaintiff regarded as an absolutely clear exception. The strength of that argument obviously depends on the clearness of the exception. The defendant contends that, if it is not to be construed as absolutely in his favour, it is at least ambiguous and doubtful; and that the covenant, so far from being uncertain, is quite clear in its language and gives the necessary aid in construing the exception.

As to the counter-claim, I agree with the judgment of my brother Dodd, and I do not propose to repeat the reasons on which it is grounded, inasmuch as I see no ground for dissenting from them.

I think the verdict and judgment for the plaintiff in the original action should be set aside, and judgment entered for the defendant with costs; that we should refuse to interfere with the findings of the jury on the counter-claim, or with the verdict and judgment thereon, save such portion of the latter as directs a set off of damages and costs; and that the plaintiff should pay the costs of the argument before us.

BOYD, J :—

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It is necessary in this case to carefully consider the nature of the lease; and the purpose for which the lands and premises were demised; and the several covenants contained in the lease.

The action is one for breach of duty on the part of the defendant to keep a certain channel for the passage of water free from obstruction to the water flowing therein; and the plaintiff alleges that the defendant failed to do so, whereby the demised lands suffered damage. The defendant contends that under the terms of the lease no such duty was imposed upon him, inasmuch as he only reserved to himself the flow of the water through the channel, and did not reserve the bed or banks of the said channel; and that it was the duty of the plaintiff, to whom all the lands were demised, to maintain and keep the channel in good order and condition; and that it was by the plaintiff's own default the damage by flooding was occasioned.

The same lands had been previously demised to a man named M'Court under a lease containing reservations as to the water-course similar to those in the lease under which the plaintiff is the present tenant. M'Court during his tenancy always cleaned and looked after the said channel, but even during his term the lands were always subject to flooding. I do not, however, think that, because he performed the duty of clearing the channel and drains, that therefore the plaintiff was bound to do so, unless the terms of his lease impose this duty upon him.

It is therefore necessary to consider the terms and object of the lease, and the covenants contained therein.

The lease, which is dated 16th May, 1904, begins with a recital that both the tenant and the landlord agree that the lands are building lands, and that the lessor has agreed "for his own temporary convenience, pending the construction of roads, and avenues, and the general development of the said lands and their permanent letting for building purposes, to make a lease" subject to the terms, conditions, and covenants therein.

The next recital is; that it was part of the said agreement that the lessee should pay the rent, *but* that he should before the 1st May, 1905, erect and complete, and at all times during

K. B. Div. the term of this demise preserve and maintain in a proper and
 1909.
ANDERSON workmanlike manner, a good and sufficient post and wire fence
v. round the outside boundary and internal divisions of the premises,
CLELAND. "where same is not sufficiently protected or divided by the exist-
 Boyd, J. ing fences and divisions," and also erect good and sufficient gate
 posts, and gates at the several approaches to the county roads,
 and also before said date put the dwelling-house and outhouses in
 good repair; and that "in consideration of such works, expendi-
 ture, and maintenance the lessee was to have the premises" free
 of all rent up to the 1st May, 1905.

The lands demised by the lease contain 117A. 3R. 28P. statute measure together with the rights, members, incidents, appendances, and appurtenances to the said lands or any part thereof belonging or in anywise appertaining, "excepting and always reserving out of this demise unto the lessor, for his *exclusive use and benefit*," amongst others, "rivers and rivulets, lakes, pools, water, and water-courses, and all *necessary* power and dominion in every respect over the same"; and also reserving to the lessor power and liberty to divert, embank, and apply the said rivers, rivulets, lakes, pools, water, and water-courses in such manner as the lessor shall see convenient or expedient to direct and appoint; and also excepting and reserving unto the lessor all and every such reasonable roads and ways to church or other place of worship, mill, kiln, or market; bogs, mosses, springs, wells, and places of *watering cattle, &c.*, "*as have formerly been used or shall hereafter be found necessary or useful to the lessor.*" The lessee covenanted to well and effectively drain the said lands for the improvement thereof, and that he would use all the lands as *dairy or pasture* land. The lease also contains a covenant by the lessee to erect and complete the fences as before mentioned; and also that he would at all times during the term keep in repair and preserve all the fences, roads, walls, paths, and sewers on the lands, and so deliver up the same, "and all *ditches, gates, stiles, hedges, banks, bridges, water-courses, and enclosures in, upon, or around the said premises in good repair, order, and condition* at the end or sooner determination of this demise."

I have only referred to such portions of the said lease as I consider necessary for the determination of the matters in dispute in this action.

The principal question at issue is, upon whom devolved the duty to keep the banks and bed of the stream or water-course in repair? If the said banks and bed vested in the defendant under the reservation of the water-course to him, he would be liable for the consequence resulting from their non-repair; but if by the terms of the lease the plaintiff became entitled to the banks and bed, he would be responsible.

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It is therefore necessary to consider what passed to the defendant under the reservation of "water-courses." In the case of *Taylor v. The Corporation of St. Helens* (1), Jessel, M.R., in his judgment, at p. 271, says:—"A grant of a water-course in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or right to the running water, it may mean the channel-pipe or drain which contains the water, and it may mean the land over which the water flows. Which it does mean, must be shown by the context; and if there is no context, I apprehend that it would not mean anything but the easement—a right to the flow of the water." James, L.J., in his judgment at p. 277, states:—"The word 'water-course' has no definite meaning in the English law as a description of a corporeal tenement. Water-course in its natural and ordinary meaning is, as it implies, the course of water; and a grant of a course of water would be a grant of an easement, and not a grant of a corporeal tenement." In that case the Court was of opinion that, from the context, the grantee was entitled to the property of the channel, and to the right to take the water that got into that channel. In that case, as in the present case, the channel was an artificial channel, in some parts covered over, and in some parts open, but there was also in the grant a clause (which is not in the lease in this case) conferring on the grantee the right relied on by Jessel, M.R. (p. 274), "In and upon such lands to bore, cut, dig, embank, trench, sough, and tunnel, and to remove or lay all soil, trees, gravel, or sand, or any other materials, &c. which may be necessary for constructing, completing, maintaining, repairing, or using the same; and also from time to time, cleanse, open, and repair the said springs or streams of water, water-courses, &c., as occasion may

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require." In the present case the defendant merely reserved and was granted the right to "the exclusive use and benefit" of all the water and water-courses upon the lands granted to the plaintiff, and to divert the same; and also the right of way to the "places of watering cattle, &c., *as have formerly been used or shall hereafter be found necessary or useful to the lessor.*" There is no power or reservation to him of any right to cleanse, open, and repair the water-course, and therefore, there could be no duty imposed upon him to do so. The lease provides that all the lands shall be used as "dairy or pasture land." For such use the cattle should necessarily have access to the water; and watering-places should be constructed by the lessee, or the cattle would trample down the edges of the water-course. If the tenant is not the owner of the lands enclosing the water-course, he could not construct watering-places, or permit his cattle to have access to the water.

It is to be observed that there is no power whatever conferred on the defendant to enter upon the lands demised, except for the purposes therein specifically provided for, and these do not confer on him the power to enter for the purpose of clearing the water-courses. If he entered for that purpose, or for any purpose not within the reservation, he would be a trespasser: see *Barker v. Barker* (1); *Neale v. Wyllie* (2); *Stocker v. Planet Building Society* (3). By one of the covenants in the lease the tenant is bound to well and sufficiently drain the lands and premises for the improvement thereof. I cannot discover from the evidence, or from an inspection of the map given in evidence at the trial, that there was any other way by which the water from such drains could have exit from the premises, except by connecting them with the water-course. Unless the tenant had dominion over the banks of the water-course he could not perform this covenant. The landlord appears to have reserved to himself all the "rivers, rivulets, lakes, pools, water, and water-courses, with power to divert, embank, and apply" them as he would see convenient. Could it be contended that if he exercised this power he would become possessed of the land occupied

(1) 3 C. & P. 557.

(2) 3 B. & C. 533.

(3) 27 W. R. 793; (on appeal), p. 877.

by such works? His object appears to have been to obtain dominion over all the water, but not over the land. I am of opinion on these grounds that the word "water-courses" in the lease means the easement of the right to the running water, and does not mean "the channel-pipe or drain which contains the water," or the land occupied by the water; and that, therefore, the lessor was not guilty of default in respect of the obstruction complained of.

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With his defence the lessor counter-claims for damages by reason of the breach by the plaintiff of several of the covenants contained in the lease. One of these covenants was in respect of the drainage to which I have referred. No drains whatever were made or cleared by the plaintiff, and he therefore broke this covenant, as undoubtedly the lands required to be drained. The only defence to this breach of covenant was that its performance was rendered impossible by the acts and defaults of the defendant in not keeping the water-course free from obstruction. If I am right as to the water-course before-mentioned, this defence was not sustainable, and nominal damages, at least, should have been found for the defendant on this issue: *Morony v. Ferguson* (1).

The lease was made to the plaintiff on the express agreement and condition that the lands should be used and worked for dairy or pasture purposes, and that only a small portion thereof should be broken up for tillage, and that at least three-fourths should be in grass. This covenant also was broken by the plaintiff, who admitted in cross-examination that he used the lands mainly for growing vegetables for Belfast, and that he did not use them for grazing. The jury have found there was no breach. In my opinion, on the admitted facts, this finding is absolutely wrong, and cannot be sustained.

The next breach of covenant relied upon in the counter-claim is in respect of the neglect of the plaintiff to fence the grounds as provided by the covenant in the lease.

The lease recites that "it was part of the agreement that the lessee should pay the yearly rent hereinafter mentioned, but that

(1) *Ir. R. 8 C. L. 551.*

K. B. Div. he should, before the 1st May, 1905, erect and complete, and, at 1909. — all times during the term of this demise, preserve and maintain
ANDERSON in a proper and workmanlike manner," the fences and gates, &c.
v. (as I have hereinbefore mentioned), and that in consideration of
CLELAND. such works and expenditure the lessee was to be wholly free of
Boyd, J. all rent up to the 1st May, 1905.

The rent thereby remitted by the-lessor amounted to £235 10s. He, in fact, paid the lessee this amount of rent to be expended on the fencing, &c., within the year. The latter has not performed this agreement, and the covenant at the expiration of the year was broken once and for all. The lessee did practically none of the fencing, &c., and the jury have found that he "failed to erect fence. *Landlord no loss.*"

In my opinion the defendant was entitled to recover substantial damages for this breach during the currency of the lease. See *Luxmore v. Robson* (1); *Coward v. Gregory* (2); *Metge v. Kavanagh* (3). At the least, nominal damages should have been awarded: *Morony v. Ferguson* (4); *Macnamara v. Vincent* (5).

The lease made to the plaintiff may, under its provisions, be put an end to at any time the landlord may require the lands for building purposes. The premises are quite close to the City of Belfast, and though twenty-one years is the term in the lease, it might be terminated at any time by the landlord requiring it for building purposes.

I think the landlord has a right to bring an action for breach of the covenant during the currency of the lease, and the only question that could arise would be as to the amount of the damages, which, at the least, should be nominal.

On the whole case, I am of opinion that the verdict and judgment in the entire action should be set aside; and that judgment should be entered for the defendant in respect of the claim made by the plaintiff; and that a new trial should be directed in respect of the matters mentioned in the counter-claim; and that the plaintiff should be ordered to pay to the defendant

(1) 1 B. & Ald. 584.

(2) L. R. 2 C. P. 153.

(3) Ir. R. 11 C. L. 431.

(4) Ir. R. 8 C. L. 551.

(5) 2 Ir. Ch. R. 504.

the costs of the trial, so far as relates to the original action, and also the costs of this argument on the new trial motion, but that the costs of the trial so far as they relate to the counter-claim should abide the result of the new trial.

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The plaintiff appealed (1).

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Bates, K.C., and *Andrews* (with them *Moore, K.C.*), for the plaintiff:—

Jan. 26, 27.

The principle on which we rely is that laid down by the Court of Appeal in England in *The Grosvenor Hotel Co. v. Hamilton* (2). We contend that by the exception in the lease of *inter alia* "water-courses," the lessor is owner of this water-course or culvert, and, in the absence of an express covenant, relieving him from such an obligation, is responsible for the injury to us as adjoining owner. The question on such an exception is always one of construction subject to certain well-settled rules: *Cardigan v. Armitage* (3); *Gale on Easements* (8th ed., p. 380); *Caledonian Railway Co. v. Sprot* (4); *Humphries v. Cousins* (5).

The plaintiff seeks, from the inclusion of "water-courses" in the covenant to deliver up possession of the premises in good repair, to control by this covenant the operative part of the deed. This is inadmissible; on the contrary, the operative part always controls such a covenant, and the draftsman cannot by such a covenant enlarge the subject-matter of the demise. The covenant to repair does not apply to water-courses.

The natural meaning of "water-course" is "channel": *Remfrey v. Surveyor-General of Natal* (6).

The full power and dominion over the subjects of the exception and reservation given to the lessor exclusively show that it was not intended that the tenant should in any way interfere with this culvert.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY:

(2) [1894] 2 Q. B. 836. (3) 2 B & C. 197. (4) 2 Macq. H. L. 449.

(5) 2 C. P. D. 239.

(6) [1896] A. C. 558.

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Ronan, K.C., and Pigot, K.C. (with them D. M. Wilson, K.C.),
for the respondent:—

“Water-course” in the exception means the stream; in the covenant to deliver up in good repair it means the channel. If there is any conflict, the proper meaning of the term where first used must prevail without an aiding context. “Water-course” means the easement, the right to the flow of the water: *Doe d. Egremont v. Williams* (1); *Taylor v. Corporation of St. Helens* (2).

At common law, the person who has the use of the culvert ought to repair it. The lessor might have covenanted to do so, but he has not so covenanted, and he cannot be made liable for the neglect of the lessee: *Taylor v. Whitehead* (3), *per* Lord Mansfield. The utmost that the lessor was bound to do was to abstain from obstructing or diverting the stream: *Pomfret v. Ricraft* (4); see judgment of Twysden, J., which was affirmed by the Exchequer Chamber; *Liford's Case* (5). Where lands are granted or demised for a particular purpose, the grantor or lessor cannot do anything which would derogate from his grant by preventing the lands from being used for that purpose: *North-Eastern Railway Co. v. Elliot* (6); see *per* Lord Kingsdown (p. 362). There cannot be an exception or reservation inconsistent with the purpose of the demise: *Great Western Railway Co. v. Bennett* (7); see *per* Lord Cranworth (p. 40); *Savill Brothers v. Bethell* (8); see *per* Stirling, L.J. (at p. 537); Norton on Deeds, pp. 118, 119. Where you have a grant and an ambiguous exception, the maximum at the date of lease passes to the lessee: *Bullen v. Denning* (9). The construction of the exception cannot vary from time to time. The covenant to deliver up the water-course in repair involves its possession by the lessee, and implies an obligation on his part to keep it in repair, as possession might be demanded at any time. The omission of water-course in the express covenant to repair was plainly an accidental oversight of the draftsman. The

(1) 11 Q. B. 688.

(2) 6 Ch. D. 264.

(3) 1 Douglas 748.

(4) 1 Saund 320 f. (1 Wms. Saund.
557).

(5) 11 Rep. 51.

(6) 1 J. & H. 145; 10 H. L. C. 333.

(7) L. R. 2 H. L. 27.

(8) [1902] 2 Ch. 523.

(9) 5 B. & C. 842.

relationship of landlord and tenant in Ireland rests on contract. *Appeal.*
 Without express contract there is no obligation on a landlord to 1910.
 execute repairs on the premises demised. The absence of any *ANDERSON*
 covenant by the landlord to repair raises the presumption that *v.*
 the obligation to repair was to rest on the tenant. *CLELAND.*

As to the damages, they were excessive, having regard to the power of the lessor to resume possession at any time.

Bates, K.C., in reply:—

The defendant's counsel try to construe the lease by outside circumstances. The rights and obligations of a riparian owner in reference to repairs are not the same in the case of artificial water-courses as of natural water-courses: *Ormerod v. Todmorden* (1). A covenant to deliver up in repair is different from a covenant to repair. In *Pomfret v. Ricroft* (2), the right to the common use of the pump was part of the demise. As to the extent of liability of the owner of artificial water-course to an adjoining owner of property, he is liable for flooding, even though caused by exceptional and unprecedented rainfall: *Fletcher v. Smith* (3).

With respect to the damages awarded in the original action, the Court ought not to interfere unless convinced that they were unreasonably large. There were serious floodings on several occasions, rendering much of the lands useless; the jury inspected the premises, and the learned Judge who tried the case does not express any dissatisfaction with the verdict.

THE LORD CHANCELLOR:—

Feb. 14.

In this case the plaintiff, Robert Wood Anderson, is tenant to the defendant, William H. Cleland, under a lease, dated the 16th of May, 1904, of certain lands called Castlehill, containing 117A. 3R. 28P., situate partly in the county of Down, and partly in the County Borough of Belfast. The term of the lease is twenty-one years, and the rent is one increasing by stated increments at fixed periods from £233 10s. to £294 16s. 4d. Four

(1) 11 Q. B. D. 155.

(2) 1 Saund. 320*f*.

(3) 2 A. C. 781.

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open streams run through the lands, and at one point converge into an artificial covered brick culvert, lying 8 or 9 feet below the surface of the ground. It is about 2 feet 9 inches high, and 2 feet 3 inches wide. This culvert was in existence when the lease was made, and for many years before; and it extends through the lands, so far as I can see, about three-quarters of a mile down to the Newtownards Road.

There is no doubt that the culvert collapsed in at least three places since the date of the lease, in May, 1907, in October, 1907, and February, 1908; and that from this cause flooding of the plaintiff's lands resulted. It was proved that 40 acres were flooded, and the jury estimated the damage to the plaintiff's lands at £300; and if the defendant was liable in point of law, we have no right to question the verdict of the jury on this point, and this was really not disputed.

But two questions of difficulty and importance were raised—first, whether the culvert or covered water-course was reserved to the lessor, so as to become his property; and second, whether, even if it was, he would be responsible for the collapses of the culvert which caused the flooding.

There was a counter-claim by the defendant, relying upon four distinct breaches by the plaintiff of covenants on his part contained in the lease, to which I shall hereafter refer; but those claims must be kept quite distinct from the questions arising under the reservation.

With a view to the consideration of the construction of the reservation, it appears by the lease that the lands are building lands, and that they are part of Stormont Castle demesne, and there is a clause in the lease authorizing immediate resumption of the lands, or any part, if required for building purposes. [His Lordship read the first recital and the reservation.]

What is the meaning of this reservation, apart from anything in the rest of the deed? We must remember this is an artificial channel: *Taylor v. Corporation of St. Helens* (1), where James, L.J. says:—" 'Water-course' may mean not only the flowing of the

water in its ordinary course, but the corporeal thing through which that water flows"; and in *Remfrey v. Surveyor-General of Natal* (1) Lord Davey went further when he defined "water-course" in its more natural meaning as a channel in which water flows. It will be noticed that lakes and pools are reserved also. I think there is much in this case in the circumstances which favours that construction.

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The lands were intended to be used at any time that the lessor desired for building purposes, and it was desirable and necessary that he should have the control over all water supply. It was within the County Borough of Belfast, where stringent regulations exist, and it was essential for him to take up with the building lands the water-rights existing in connexion with them and for their benefit.

There has been on this point a division of opinion amongst the three Judges who heard the case. I agree with the dissenting Judge, and think, by the operative part of this deed, the structure of this artificial channel, and all dominion over it, and water itself, were reserved.

But then it is strongly argued that the covenants in the lease are inconsistent with this construction—[His Lordship read the covenants from the covenant to drain down to the covenant to keep and deliver up the premises in good repair, and the subsequent covenant to deliver up in repair, naming water-courses.] Whatever ambiguity there is in them, they must give way to the grant by the lessee of the culvert to the lessor. That was the opinion of Mr. Justice Gibson, who tried the case, and I agree with him. It will be observed that there is no covenant to keep in repair during the lease; it only refers to delivery at its end. There might possibly be water-courses coming into existence during the lease. In *Doe d. Egremont v. Williams* (2) "water-courses" received different interpretation in different parts of the same deed.

Secondly, was the lessor liable for the damage caused by the flooding arising from the collapse of the culvert? Mr. Justice Gibson held he was, and I think that follows from the vesting of

(1) [1896] A. C. 558.

(2) 11 Q. B. 688.

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the culvert in him. The tenant was in the position of an adjoining owner injured by the nuisance arising on his, the lessor's, property; and the doctrine arising from the application of the legal rules as to non-feasance and misfeasance does not arise.

In the *Grosvenor Hotel Co. v. Hamilton* (1), which was a case between lessor and lessee, an action for rent, the lessee counter-claimed for damages from a nuisance caused by the lessor, viz., the pumping of water from land adjoining the demised premises, which caused vibration, damaging the defendant's house. Davey, L.J., says (at p. 841):—"I think the defendant had a cause of action founded, not on an implied covenant for quiet enjoyment, but on nuisance or trespass. A grantor cannot derogate from his own grant, and, therefore, if, when letting a house, he retains adjoining land, he cannot use it so as to interfere with the stability of the house."

It follows that the verdict for £300 damages from the flooding cannot be disturbed.

There remains, however, the question arising on the defendant's counter-claim. This is founded upon four distinct covenants in the lease—they are four in number. It will be remembered that the jury inspected these premises. [His Lordship read their answers as to the different breaches.] They were discriminating by finding a verdict on one breach for £40. They say, as regards the wire fence, "Failed to erect; landlord no loss," i.e. that the damages would be only nominal; and we would not be justified in granting a new trial when the damages would be only nominal. They saw the efforts that plaintiff was making to get the land into condition for a dairy farm by a rotation of crops, which the plaintiff says would require a course of years to accomplish, and I do not think we would be justified in interfering with the findings on the counter-claim. On these points we are in agreement with the majority of the Judges in the Divisional Court.

I am quite satisfied to adopt generally the views expressed in Mr. Justice Dodd's judgment. I think the appeal should be allowed as regards the claim of the plaintiff, and the £300

(1) [1894] 2 Q. B. 836.

damages, and the verdict against the defendant on the counter-claim affirmed, save as regards the £40 damages on the covenant to repair the house.

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The plaintiff must get the general costs of the action and appeal.

HOLMES, L.J. :—

This action is brought to recover from the defendant damages for the flooding of lands held by the plaintiff under lease from the defendant, by reason of breach of duty on the part of the defendant in not keeping in proper repair an artificial culvert constructed to carry the waters of a stream through the demised premises.

The principal matter discussed on the hearing of the appeal, and that on which our decision chiefly depends, is the meaning and effect of this lease. It is dated the 16th May, 1904; and by it the plaintiff demises to the defendant the lands of Castlehill, containing about 118 acres, for a term of twenty-one years. These lands are described as being part of Stormont Castle demesne; but I gather from the evidence that the plaintiff at the date of the lease had no lands adjoining the demised premises, and that a natural stream flowed from the north or north-west thereinto in an open channel to a point where it entered an artificial culvert, through which its course was continued to the lands of another owner. The lease is a poor specimen of conveyancing, and the draftsman seems to have been more desirous to produce a lengthy than a lucid instrument. Still he makes quite clear certain provisions not usually found in an agricultural or pastoral lease. It begins with a recital that it has been admitted by the lessee that the lands intended to be demised are building lands, and that the lease was to be made for the temporary convenience of the lessor, pending the construction of roads and avenues, and the general development of the lands with a view to letting them permanently for building purposes. Accordingly, although the term mentioned in the *habendum* is twenty-one years, it is agreed and declared that the lessor or other person or persons entitled to the reversion should be at liberty at any time during the continuance of the term to take up on demand, without any previous notice, the

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whole or any portion of the premises which he or they might require for building purposes or for the construction of roads or avenues in connexion with, or for, the development of the lands as building lands, making compensation to the lessee for loss or damage to any agricultural crop then growing, and subject to a reduction of rent for the land so taken at a carefully specified acreable rate.

I have dealt in the first place with these provisions of the lease, as they help us to understand the exceptions and reservations from the demise which have been the chief subject of argument in this appeal. They are very numerous, but it is enough to quote the following—"excepting and always reserving . . . rivers and rivulets, lakes, pools, water, and water-courses, and all necessary power and dominion in every respect over the same; and also reserving to the lessor power and liberty to divert, embank, and apply the said rivers, rivulets, lakes, pools, water, and water-courses in such manner as the lessor shall see convenient and expedient to direct and appoint." What construction is to be given to "water-courses" in the passage quoted? It is capable of two meanings—either the right to the flow of the water, or the channel through which the water flows with the water flowing therein.

It is sometimes difficult to say in which of these senses the word is used; but this difficulty does not exist in the present case. I agree with Mr. Ronan that if demised premises are to be used during the term for agricultural and pastoral purposes, it would be both unusual and unlikely that the landlord should except the channels on the lands through which the water flows. Indeed in such cases there would be little or no advantage, in the absence of special circumstances, in reserving water-rights at all. Here, however, we have an intention on the part of the lessor to take up at least parcels of the land to let for building, and for that purpose to construct roads and avenues.

If this intention is carried out, and dwelling-houses are erected, either separately or in terraces, they must have some supply of water; and hence the power given to the lessor to divert, embank, and apply the excepted rivers, rivulets, lakes, pools, water, and water-courses in such manner as he shall see convenient and expedient.

It seems to me to be a necessary incident to the exercise of this power that the lessor should have vested in him the old channel to enable him to divert the flow of the water therefrom, and the new channel created and embanked by him which is to receive the flow thereafter. The chief argument to the contrary rests on two covenants in a subsequent part of the lease. The first is a covenant by the lessee to "keep in repair and preserve in good order and condition all the fences, roads, walks, paths, and sewers" on the demised premises, "and so deliver up the said roads, walks, paths, drains, sewers, and all ditches, gates, stiles, hedges, banks, bridges, water-courses, and enclosures in, upon, or around the said premises in good repair, order and condition at the end or sooner determination of this demise." The other covenant is by the lessee to deliver up at the determination of the term the premises, together with the fixtures, gates, stiles, *et cetera*, including water-courses.

I do not agree with Mr. Ronan that the first of these covenants is a covenant by the lessee to keep the water-channels in repair; but both of them are undertakings to deliver them up in repair at the determination of the lease; and it is argued that it follows therefrom that the channel and culvert through which the water flows are included in the demise to the tenant. I should readily accept this argument if I were able to reconcile it with what is reserved and excepted out of what is given to the tenant in the early part of the lease.

It is sought to bring these inconsistencies into harmony by construing the exception of water-courses as a reservation of the right to the flow of the water. But apart from the anomaly of giving the same word two meanings in the same instrument, I feel that this would be wholly inconsistent with the lessor's power and dominion in every respect over the water-courses, including power and liberty to divert, embank, and apply them in such manner as he shall see convenient or expedient. Indeed, if water-course means only the right to the water, it adds nothing to the reservation of pools and water which immediately precedes it. Finding as I do in the deed a re-grant to the landlord in unequivocal and unambiguous language of all the channels through which waters flow, I am forced to reject so much of the

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subsequent ill-drawn covenants as seem to suggest that those channels were vested in the tenant during the term. Before passing from this branch of the case I ought to refer to Mr. Ronan's argument that, inasmuch as the tenant was bound by the provisions of the lease to use the lands as a dairy or pasture farm, the reservation of water ought to be rejected altogether as derogating from what is demised. I cannot accept the proposition that the lease of a farm to be used for the pasture of cattle necessarily carries with it a right to all the water on the lands. There are pasture farms in Ireland on which there is no water except what is carted to them from some distance; and tenants are often obliged to pay their neighbours for watering-places for their cattle. Moreover, even if there were attached to the reservation to the lessor of all water-rights and water-courses a right to the tenant to receive sufficient water for his stock, this would be a very limited right, and could not in such a lease as the present deprive his landlord of all water and water-channels.

I therefore hold that not only the right to the flow of water, but all the water-channels, including the culvert to which I have referred on the property of the defendant, are reserved and excepted to the lessor, and that neither the plaintiff nor the defendant is bound by contract to keep them in repair.

Having thus given my construction of the lease, I proceed to consider its bearing on the plaintiff's action. I have said that there flows into the demised premises a natural stream in an open course, which continues for some distance and at length enters an artificial culvert existing at a date beyond living memory. I gather from the plans produced at the trial that it was a work that required considerable time and labour in its construction; and that running, as it does through a deep cutting at some depth underground, without anything on the surface of the land to mark its course, its repair in case of any collapse would be a matter of some difficulty. Previous to the lease there had been works constructed by Mr. Irwin, a tenant of lands below Castlehill, which caused an obstruction to the water after it flowed out of the culvert and cast it back on the demised premises. This led to an action, brought in 1904, by the lessor and lessee, against Irwin, and compromised in the following year by the payment of

£150 for damages and costs, and by an undertaking on Irwin's part to execute certain changes in his works to the satisfaction of the lessor's engineer. These works were executed and a final certificate of satisfaction given in February, 1908. The present action was brought for three collapses in the culvert, occurring in 1907 and 1908, which it was alleged caused the flooding of forty acres of the demised land above and near the culvert. The jury found that none of these collapses were due to Irwin's acts, and it has not been denied that the defendant would be liable for this damage if it was his duty to keep the culvert in repair.

Gibson, J., reports that it was not disputed at the trial that the defendant would be liable for the nuisance arising from the stoppage of the underground channel, if his construction of the lease was erroneous. I think I am justified in saying that, notwithstanding some observations as to a distinction between acts of commission and mere omission to act, the attitude of the defendant's counsel as reported by Mr. Justice Gibson has been substantially adhered to in this Court. Kenny, J., states very succinctly the same proposition. "If," he says, "not only the easement of the right of flow of the water, but the culvert itself, is excepted to the defendant out of the demise, and if the covenant to give up in repair casts no liability on the plaintiff, I entertain no doubt that the defendant would be liable for obstructions in the culvert, and the consequent flooding of the plaintiff's lands; and I do not propose to discuss the law bearing on this point. What we have to decide is, whether on the construction of the lease that is the true position. The question turns on the meaning of the exception and the covenant."

I adopt these words; and having given my reasons for holding that the culvert itself is excepted to the defendant out of the demise, and that the covenant to give up the water-courses in repair must be disregarded as being contradictory to the exception, it follows from the proposition I have quoted that the plaintiff is entitled to recover in his action. I have said that the obligation to repair is not imposed on either party by contract; but I am of opinion that the law imposes a duty upon the owner of an artificial structure which, if neglected, may cause damage to the adjacent property of another, to prevent such damage by

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Appeal. taking reasonable precautions. This I regard as the foundation in
1910. law of the plaintiff's claim. The findings of the jury establish
ANDERSON v. that an extensive area of the lands adjacent to the culvert sus-
CLELAND. tained serious injury from collapses thereof. If part of the
Holmes, L.J. damaged premises were owned by a stranger, I cannot doubt that
he would have a cause of action founded on a breach of duty
against the owner of the structure which had been allowed to
become dangerous; and I hold that the tenancy of the plaintiff
to the defendant of the adjoining premises does not deprive him of
a similar right. For these reasons, I am of opinion that the
judgment given by Gibson, J., in the original action, ought to be
restored.

There remains the counter-claim, the several heads of which
appear clearly from the questions submitted to the jury.

They all arise from alleged breaches by the lessee of covenants
contained in the lease. The most important of these covenants
is an agreement by the tenant to erect certain specified fences and
put the dwelling-house and out-offices in repair before the 1st
May, 1905, in consideration that up to that date he was to have
the demised premises free of all rent. Mr. Justice Gibson, at the
request of the defendant's counsel, told the jury that there was a
time limit to these covenants, and that if they were not performed
within the period named there would be a breach thereof. He
also directed the jury that the measure of damage was the injury
or loss to the reversioner's estate. The jury found that while the
office-houses were in good repair, the dwelling-house was not, and
assessed the damages for this breach at £40. To this no valid
objection can be offered. They found, however, as regards the
fencing, that the plaintiff failed to erect the fence, but that the
landlord was at no loss; which I interpret as meaning that
nominal damages would compensate for the breach.

The jury had inspected the premises, and had probably come
to the conclusion that the fencing would be of no advantage to
the lands; and if this was the result of their view, I am not
prepared to set aside their finding. They found, as to a covenant
to-drain, that there was no breach, as it would have been useless
to do so. This is accounted for by the Judge's direction that
there would be no breach of the covenant to drain if drainage

was made impossible by the lessor's default in keeping the culvert clear. This direction was right on the construction which the Judge and this Court have given the lease; and therefore we cannot interfere with this finding of the jury. The only remaining covenant alleged to have been broken related to using the demised premises for dairy or pasture land, as to which the finding is that there was no breach. There was evidence that when the plaintiff obtained possession the lands were in such a state that it would require five years to lay them down in grass, that he had been doing everything possible to bring this about, and that all would be in grass in a short time. The jury probably accepted this evidence, and if so they could not be expected to give more than nominal damages, even if there had been a technical breach of the covenant. In considering the findings of the jury on the counter-claim, it must be remembered that they not only viewed the lands, but that it was admitted that there had been no complaint of any kind by the defendant for breaches of covenant until this action was brought.

On the whole, I am not prepared to disturb the verdict and judgment on the counter-claim given at the trial.

CHERRY, L.J.:—

I concur. The plaintiff, if he is to sustain the verdict and judgment he obtained at the trial, must prove that, upon the true construction of the lease of May 16th, 1904, the reservation therein contained to the lessor of "water-courses" comprises not only the flow of water through the demised premises, as an easement, but also the channels through which the water flows, including, of course, the underground artificial culvert, the collapse of which has caused the damage complained of in the action. He must also establish as a matter of law that a duty rests upon the defendant as owner and occupier of this culvert to prevent it, by falling into disrepair, from flooding the adjoining lands. I am of opinion that he has succeeded in both his contentions.

The word "water-course," when used in a legal document, appears to be somewhat ambiguous. "Without saying," says Coleridge, J., in *Doe d. Egremont v. Williams* (1), "that a water-

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course may never mean the channel in which water flows, it certainly may mean also the stream or flow of the water itself; and whether it means the one or the other in any instrument will very materially depend on the context." In the case in which the learned Judge was giving judgment the words to be construed were "a water-course *flowing or descending* from a head weir," and he very naturally concluded that "water-course" in that context meant the water itself, and not the channel through which it flowed.

In two subsequent cases, to which we have been referred, the meaning of the word "water-course" was considered. In *Taylor v. Corporation of St. Helens* (1) Jessel, M.R., says (p. 271):—"A grant of a water-course in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water; it may mean the channel-pipe or drain which contains the water; and it may mean the land over which the water flows. Which it does mean must be shown by the context; and if there is no context, I apprehend that it would not mean anything but the easement, a right to the flow of the water."

James, L.J., agreed with this view. The word "water-course," said he, "may mean not only the flowing of the water in its ordinary course, but the corporeal thing through which that water flows." Bramwell, L.J., also concurred, and all three Judges held that in the deed, then before them for construction, the word "water-course," from its context, clearly meant the channel through which the water flowed.

In *Remfry v. Surveyor-General of Natal* (2), the Judicial Committee of the Privy Council came to a similar decision as to the construction of a reservation in a grant. Lord Davey says (p. 560):—"It cannot be denied that a 'water-course' may mean, and perhaps the more natural meaning of it is, a channel in which water flows, and that the grant of a right to make a water-course may include the right to fill it with water, and use the water flowing in it when made."

While, therefore, there is a difference of opinion among these

high judicial authorities as to what is the primary meaning of the word "water-course," they all agree that it may mean the channel, whether natural or artificial, through which a stream flows, if the context seems to indicate that meaning. Does the context in the lease we are now construing so indicate? I think it does. The reservation is of "rivers and rivulets, lakes, pools, water, and water-courses." It is a recognized canon of construction to give to every word of a document, if possible, some effect. But if, in a reservation of "water and water-courses," the latter word were to be held to mean only the stream or flow of the water itself, whether as an easement, or a corporeal entity, it would add nothing to the reservation of "water." A reservation of "water and water" would appear to me absurd, even if did not follow, as it does, a reservation of rivers, lakes, and pools. It appears to me, therefore, that the word "water-courses" must in this case refer to the channel through which the water flows, and must include the underground culvert, an artificial structure of an unknown age, through the collapse of which the flooding which damaged the plaintiff was caused.

What reasons have been urged for taking the contrary view? Two covenants in the lease have been relied upon—(1) The covenant to use the lands as dairy lands, and (2) the covenant to deliver up in repair "all water-courses and enclosures in, upon, or around the said premises." As to the first, Kenny, J., in his judgment in the Court below, says:—"The purpose of the letting is the establishment or retention of dairy farming until building operations are imminent; and the apparent exclusion of the lessee from the benefit of any ownership in this stream for cattle-drinking purposes, and for drainage, is *prima facie* opposed to the object of the demise. Starting with this we ought to be cautious—indeed slow—in giving a meaning to the word 'water-course' that would entail the vesting of the channel and culvert in the lessor." With great respect, it appears to me that what is inconsistent with the use of the farm as a dairy farm is the reservation of the water, not the reservation of the channel or culvert. And water in every possible form is clearly reserved to the lessor by this lease. Where the channel or culvert is covered and underground, as in this case, the reservation of it cannot in any way interfere with the use of the land for dairying purposes.

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The argument based upon the covenant to deliver up in repair is to the effect that, inasmuch as nothing can be delivered up which has not previously been in possession of the lessee, the water-courses cannot have been reserved as corporeal structures in the earlier part of the deed. To this argument I think there are several answers. In the first place, it is very common to have subjects enumerated in a covenant to repair which are not upon the demised premises. Buildings are frequently so mentioned, even when there are none actually in existence. The covenant has, of course, no operation in that event, but there is no inherent inconsistency in such a covenant with the demise. In the second place, I do not think, even if there were an inconsistency, that the words of the covenant should prevail over those of the exception. It is a settled rule of law that if there be two clauses or parts of a deed repugnant the one to the other, the first part should be received and the latter rejected, except there be some special reason to the contrary: *Blaunket v. Simonson* (1); *Sheppard's Touchstone*, 88; *Norton on Deeds*, p. 80. I do not think that the express words of a grant or reservation have ever been held to be cut down by the terms of a subsequent covenant. But, in the third place, in order to present the argument at all, it is necessary to give to the word in the covenant the very meaning which is denied to it in the exception! Surely, this covenant to deliver up in repair is an almost unanswerable argument for construing the word "water-course" as the channel or culvert through which the water flows. How can you repair water, or deliver it up? A construction of a deed which gives to a word recurring several times the same meaning in each place is surely preferable to one which must give it a different meaning, even though, in the former case, there may be a covenant, which, for want of a subject-matter, may have a somewhat restricted operation.

Assuming, therefore, that this underground culvert was reserved to the defendant by the lease, was he under any liability to the plaintiff for damages caused by its being allowed to collapse? In other words, was there any duty imposed upon him to keep it

(1) Year Book 2 Edw. II. 29.

in good order, so as to prevent the flooding of plaintiff's lands? The duty alleged is not one arising out of the covenants in the lease or the relation of landlord and tenant, *per se*, but is based upon an implied covenant or an obligation *in rem* entirely independent of contract—the duty of one adjoining owner to another. Appeal.
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Where a natural stream flows through a man's lands, he is under no liability to keep the channel clear, and if by natural causes it becomes silted up or choked with reeds, he is not in any way responsible to an adjoining owner who is in consequence injured by flooding. But I do not think that the same rule applies where the channel is artificial, and where the damage would not have occurred if the river had been left in its natural state. Of course if the mere construction of the artificial channel caused the obstruction of the flow of water, the person who made it would clearly be liable; but even if the obstruction were caused merely by a negligent maintenance of the works—an act of omission as distinguished from commission—I think he would also be liable. The case of *Bligh v. Rathangan Drainage Board* (1) is clearly an authority on this point. There the defendants, acting under statutory powers, made deeper and wider the bed of a river and diverted into it another stream. They failed to exercise due care in cleansing the river bed, which became choked with accumulations of mud and silt, and thereby caused the flooding of the plaintiff's lands. For this they were held liable. "Damage which is caused," says Pales, C.B. (at p. 219), "by the negligent maintenance by the defendants of their authorized works in a state calculated to cause unnecessary damage does not reasonably result from the authorized work. For it redress cannot be obtained under the compensation clauses, and for it an action lies, as the justification afforded by the statute does not extend to it." I think the position of an owner constructing an artificial water-course on his own land is precisely similar to that of a Drainage Board acting under statutory powers, as in this case. Gibson, J., in his report, exactly expresses the application of this view of the law to the present case. "I thought," he says, "the lessor was under an implied duty not to allow the culvert to be obstructed

(1) [1898] 2 I. R. 205.

Appeal. by collapse or to get into a state which would pen back the water,
1910. create a nuisance, and injure the lessee in his enjoyment of the
ANDERSON demised premises." I entirely concur in this view.

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CLELAND. As to the counter-claim I agree with the judgments of the other
Cherry, L.J. members of the Court and of Dodd, J., in the Court below.
The jury, who saw the premises, and who appear to have exercised
a very reasonable discrimination as to the various claims by
the defendant for breach of covenant, were in a much better
position to judge of the amount of damage sustained than we
would be. The learned Judge who tried the case appears to have
been satisfied with the findings, and I can see no reason for
disturbing them. I do not think that there was misdirection
by the learned Judge who tried the case, upon any of the points
raised.

Solicitors for the plaintiff: *E. & R. D. Bates.*

Solicitors for the defendant: *Shean & Dickson.*

W. G.

WALDRON *v.* THE JUNIOR ARMY AND NAVY
STORES, LIMITED (1).

(1909. No. 904.)

K. B. Div.
1909.

June 23, 24,
Nov. 29.

Appeal.
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Master and servant—Negligence of fellow-servant—Personal injury sustained in course of employment—Privilege given and enjoyed under contract of service. Jan. 24, 25, 26.

The employees in a large establishment belonging to the defendants, and consisting of numerous separate departments, were as part of the contract of service entitled to purchase goods in any department at a reduced price. The plaintiff, who was employed in the toy department on the third floor of the building, while purchasing meat at the butcher's department on the ground-floor, slipped on a piece of fat negligently (as found by the jury) left on the floor by the butcher, and sustained severe injuries.

Held, that the injuries were caused in the course of the plaintiff's employment by the negligence of a fellow-servant, and that the plaintiff could not sustain an action for damages against her employers, the defendants.

Coldrick v. Partridge, ([1909] 1 K. B. 530; [1910] A. C. 77), applied.

MOTION on behalf of the plaintiff to enter judgment for the sum of £500, being the damages assessed by the jury at the trial; and motion on behalf of the defendants to enter judgment for them.

The facts of the case, which are outlined in the head-note, are fully stated in the judgment delivered by the Lord Chief Baron in the King's Bench Division.

Powell, K.C., and *James O'Connor, K.C.* (with them *Chambers, K.C.*, and *Alfred Coffey*), for the plaintiff.

Fetherstonhaugh, K.C., and *E. S. Murphy* (with them *Henry, K.C.*), for the defendants.

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The stores of the defendants in D'Olier Street in this city consist of several departments; of these one is a fishing-tackle and toy department, and another is a butcher's department. The employees of the defendants, including the plaintiff, were in the habit of making purchases in the butcher's department, with the consent of the defendants; I shall later on refer to the terms of the contract permitting this.

On Saturday, the 24th October, 1908, the plaintiff, who was employed in the fishing-tackle and toy department, went to her work at half-past eight in the morning. At a quarter after nine she left her department, which I understand is on one of the upper floors, and went down to the butcher's stall, which is on the ground-floor, for the purpose of purchasing meat. She ordered meat there, and was told by the butcher to come back for the bill when the morning orders were clear. She went back about twelve o'clock, got the bill for the meat, handed it to the defendants' superintendent to be initialled in order to get the reduction of 10 per cent. on the price, to which the defendants' employees were entitled, and she then went to the butcher and told him to have the meat ready shortly before two o'clock, the hour at which she would be leaving. When it was near two o'clock, she went back to the butcher's stall in connexion with the purchase, and while there she slipped upon a piece of fat, and by the fall sustained very serious injury, for the recovery of damages for which the present action is brought.

At the trial the jury found in answer to questions left to them by Mr. Justice Madden—(1) That it was the duty of Langan, the butcher, to dispose of the extra fat with reasonable care, so as not to cause danger to persons lawfully using the passage in which the plaintiff slipped; (2) That the piece of fat on which she had so slipped had been negligently disposed of by Langan; and (3) that the plaintiff at the time of the occurrence was engaged in purchasing meat for her own use from the defendants. They also found (4) that it was one of the terms of her engagement that she should be at liberty to purchase goods from the defendants at reasonable times, at a reduction of 10 per cent., (5) that the purchase made by her was in accordance with that agreement; and they assessed

the damages at £500. The learned Judge abstained from giving judgment, and the case came before us last term upon motion by the plaintiff and the defendants respectively to enter judgment for them.

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I regret the delay which has occurred in giving judgment. The motions were moved upon practically the last day of term, and the necessity of my sitting in the Court of Appeal, owing to the lamented death of Lord Justice Fitz Gibbon, has prevented me sitting in the Court until to-day.

Upon the arguments of the motions the defendants insisted upon two propositions—First, that there was no evidence of negligence in Langan, the defendants' butcher; and, secondly, that even if there were, Langan and the plaintiff were in a common employment, and, consequently, that the defendants were not responsible to the plaintiff for Langan's negligence.

In the view which I take of the case it is unnecessary to consider in detail the first ground relied on by the defendants. It is sufficient to say that, in my opinion, there was evidence that Langan was negligent, and that the plaintiff's injuries were caused by that negligence. No question has been raised as to contributory negligence.

The second ground relied on by the defendants requires more careful consideration. The answer presented to it by the plaintiff's counsel is that the true relation between the plaintiff and the defendants at the time of the occurrence was that of vendor and customer, and not that of master and servant; and that the defendants were under the same liability to the plaintiff in relation to providing reasonably safe access to the butcher's stall as they would have been to one of the outside public who was approaching the stall for the purpose of purchasing. Whether, under the circumstances, the defendants are responsible to the plaintiff for Langan's negligence is the question which we have to determine.

The general principle in relation to the liability of a master to a servant for injuries sustained by the latter through the negligence of a fellow-servant is now absolutely settled. As between the master and a stranger, that is, a person not in privity with him under a contract, the act of a servant in the course of his employment, and acting within the scope of his authority, is in

K. B. Div. 1909. contemplation of law so far the act of the master that the latter shall be answerable for it *civiliter*; in other words, the old maxim *“respondeat superior,”* applies. But this pre-supposes that the parties stand to each other in the relation of strangers, between whom there is no privity. It does not apply to the case of a servant bringing an action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated. In such a case, therefore, as the present, the claim must be maintained (if maintainable at all) on the ground of contract; and as there is no express contract between the parties applicable to this point, it is based on the footing of an implied contract of indemnity arising from the relation of master and servant. But there is no such implied contract in the case of master and servant. As stated by Shaw, C.J., in the American case of *Farwell v. Boston & Worcester Railroad Corporation* (1), which was approved of and followed by our House of Lords in the well-known case of *Bartonshill Coal Company v. Reid* (2), the rule is laid down thus:—

“The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which would except the perils arising from the carelessness or negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.”

(1) 3 Macq. 316.

(2) *Ibid.* 266.

It is unnecessary to say that the modern cases are absolutely conclusive that the employment of the defendants, in which both Langan and the plaintiff were respectively engaged, was a "common employment," as it is usually called—the "same employment," as it is termed in the judgment of Shaw, C.J. The real question, therefore, appears to me to be, whether the risk of Langan's negligence injuring the plaintiff when she was engaged in purchasing meat was one which she impliedly undertook by her contract of employment—in other words, what was the real relation between the parties?

The material provisions of the rules which were part of the terms of the employment were :—

"5. Every such person (*i.e.*, every employee) shall attend at the stores for commencing business at such times as the convenience of the business may require, or as may be appointed, and remain on duty until such hour as may be necessary for the purpose of the business of the stores.

"16. No person subject to these rules shall on any pretence whatever absent himself or herself during the hours of business (except at the interval allowed for dinner) without the permission of the manager.

"21. Heads of departments will be responsible that those under them are at their posts by the hour for beginning business, and are not improperly absent throughout the day.

"30. All persons subject to these rules are entitled to deal with the stores under the regulations laid down from time to time, and must make their purchases before 10 a.m."

I understand that no question arises as to the purchase in this case having been made after 10 o'clock in the morning, instead of before it.

"31. No person connected with the stores in any capacity can be permitted to carry away parcels of goods of any description without producing a regular receipt for payment, and submitting any parcel to examination if required so to do. All staff purchases will be dealt with according to 'staff order' regulations as issued from time to time by the manager."

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I assume that the "staff purchases" there referred to include purchases by the employees.

"32. All parcels, whether the private property of an employee, or of any other nature whatever, will be liable at all times to be opened and examined. Employees' private property will not be allowed to be passed out of the stores without a signature of authority from the manager's office."

The obligation of the defendants to a person who is entering their butcher's shop to use due care, depends upon the character in which such person was upon the defendants' premises. To a trespasser they would be under no obligation; to an ordinary stranger entering for the purpose of purchasing, there would be an obligation to use due care. To a servant there would be an obligation that he or she should not be exposed to unreasonable danger by reason of the personal negligence of the defendants; but there would be no obligation on them to be responsible for the consequences of negligence of other servants in the same employment in which the person entering was.

Now, what was the relationship between the defendants and the plaintiff at the moment she slipped upon the piece of fat? Was it that of master or servant, or was it in contemplation of law that of vendor and purchaser. In my opinion, it was that of master and servant. I think the passages I have read from the rules clearly show that the plaintiff's period of service extended over the entire time from her entering in the morning until her leaving the stores at the conclusion of the day's work, save during dinner time. There is no doubt that if the occurrence complained of happened whilst the plaintiff was entering the stores at the commencement of her daily duties, or whilst she was leaving the stores at the termination of those duties, or while she was passing from one part of the premises to another in the course of the performance of those duties, the defendants would not have been liable: *Coldrick v. Partridge* (1). The same result would have ensued had the accident taken place during her entrance in the morning, although she then intended to purchase meat during the day, or if it had taken place upon her leaving the premises in

(1) [1909] 1 K. B. 530. Since affirmed in H. L. [1910] A. C. 77.

the evening at the termination of the day's duties, although in the course of the day she had purchased meat, and was actually carrying it away. In each of these cases the relation between the plaintiff and the defendants, by reason of which she was at the portion of the defendants' premises at which the occurrence took place, would have been that of master and servant. Can it then be contended that the relation between the parties changed from that of master and servant to that of shopkeeper and customer the moment the plaintiff determined to leave her own department to go to the butcher's, and that the new relation continued until she had returned to her own department? I am clearly of opinion that it cannot. It seems clear that during the progress from her own department to the butcher's, she was under the control of the defendants through their heads of department, who at any time might have ordered her back to her own department.

Further, the relation, so far as it existed, of buyer and seller was incident to, and arose out of, the contract of service. Her title to leave her department was not because the relation of master and servant ceased, but because being a servant she was entitled to deal at the butcher's department, and to obtain goods there at a reduced rate.

Of the many cases cited I shall refer but to two.

In *Tunney v. Midland Railway Company* (1) the plaintiff was employed by the defendants as a labourer, to assist in loading a "pick-up" train with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham, where he resided, and whence the train started, to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after the day's work, the train in which he was travelling came, through the negligence of the guard who had charge of it, into collision with another train, whereby the plaintiff was injured. It was held that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts an employer

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K. B. Div. from liability to a servant for accidents arising through the negligence of a fellow-servant where both are acting in a common employment. There Erle, C.J., said:—"The only question is, whether the plaintiff was at the time in the employ of the company. Clearly he was. It was part of his contract of service that he was to return each day to Birmingham by the pick-up train. There is nothing therefore to take the case out of the ordinary rule."

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Willes, J., says:—"The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference. It was part of his contract that he was to be carried by the train to and from the place where his work happened to be."

The above was a case of express contract that the servant should do the thing in the course of which the injuries were sustained. Nearer to the present case is *Coldrick v. Partridge* (1), in which as here the plaintiff had the option of doing, but was not bound to do, the act in the course of the doing of which the injuries happened. The defendants there were colliery proprietors who had a railway in connexion with their colliery, and were accustomed to run a train thereon for the carriage of their colliers, free of charge, after the day's work was done, from the colliery towards the place where the colliers lived. One of these colliers while being so carried met his death through an accident occasioned by the negligence of a servant of his employers, who was engaged in the repair of a bridge over the railway. It was held, first by Bray, J., and afterwards by the Court of Appeal, that the defendants were not liable. In giving judgment there, Bray, J., says:—"It was strongly urged for the plaintiff that the servant was invited by the defendants to enter into and travel by the train, and that that raised an implied promise by them to take reasonable care; but the servant is equally invited by the defendants to enter their premises so that he may proceed to the place where he has to work."

And then come the words clearly applicable to the present case—"You have to look at the character in which the person was invited in order to see what the implied promise is. The implied

(1) [1909] 1 K. B. 530. Since affirmed in H. L. [1910] A. C. 77.

promise varies according to whether the person invited is a customer, a guest, a stranger, or a servant, and if he be invited as a servant and for the purpose of enabling him to perform his service or leave it, it seems to me that the promise to be implied is that which is raised by the relationship between the master and servant."

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Farwell, L.J., in the Court of Appeal, says:—"One incident of his employment was that, as a matter not of right but of grace, he was allowed to use, free of charge, a train which his employers ran for the benefit of workmen and others employed at the colliery, but not of outsiders. Had it been the case of a contract, the case would have been undistinguishable from *Tunney v. Midland Railway Co.* (1). The learned Judge has, however, found that as a matter of invitation by the employers the workmen employed at the colliery had been in the habit of using, and had never been prevented from using, the train for the purpose of coming to and returning home from the colliery, and that this had been the invariable course ever since 1900. Under these circumstances I think that the enjoyment of that advantage must be regarded as one of the incidents of their employment."

So, here, I think that the enjoyment of the advantage of purchasing at the reduced price must be regarded as one of the incidents of the plaintiff's employment.

Upon the whole, therefore, I have arrived at the conclusion, and there is no harm in saying that I have arrived at it with regret, that the plaintiff is not entitled to recover, and consequently the verdict must be changed into one for the defendants, and judgment entered thereon accordingly.

JOHNSON, J.:—

The jury have found that the piece of fat on which the plaintiff slipped and fell was negligently disposed of by Langan, the butcher in defendants' service, who, it appears by the evidence, was supplied by defendants with a suitable receptacle in which to dispose of his waste scraps of meat. There was evidence to sustain this finding of the jury, and the questions which have been argued and are

(1) L. R. 1 C. P. 291.

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now for decision are, first, whether the defendants are exonerated from liability in this action on the ground that plaintiff and Langan were fellow-servants engaged in a common employment, or, second, that the occurrence took place under circumstances which negative the existence at the time of the relation of fellow-servants engaged in a common employment. The reported cases on the application of this doctrine of common employment are very numerous, but the principle on which the doctrine rests is stated by Blackburn, J., in *Morgan v. Vale of Neath Railway-Co.* (1) :—
“There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages.” In that case a carpenter in the employment of the defendant company was standing on a scaffold mending an engine-shed of the company. Porters, also in the employment of the company, shifting an engine on a turn-table of the company, allowed it to project too far over the turn-table, and it knocked down one of the supports of the scaffold, and the plaintiff was thrown off and injured. The plaintiff was non-suited, and judgment entered for the defendant company. The plaintiff appealed to the Exchequer Chamber (2), where the judgment of the Queen’s Bench was affirmed. Erle, C.J., in delivering the judgment of the Court, cites the above passage from the judgment of Blackburn, J.; and Pollock, C.B., says :—
“It appears to me that we should be letting in a flood of litigation were we to decide the present case in favour of the plaintiff. For if a carpenter’s employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shows that we must not over-refine, but look at the common object, and not

(1) 5 B. & S. 570; 33 L. J. Q. B. 265.

(2) L. R. 1 Q. B. 149.

the common immediate object." This answers the first point in the affirmative, viz., that different departments in one establishment do not constitute an exception to the legal consequence of the common employment of plaintiff and Langan as fellow-servants.

Then on the second point, it was argued for the plaintiff that while she was away from her department engaged in purchasing her meat, she was practically her own mistress on her own business, and therefore the doctrine of fellow-servants in a common employment did not apply; but it was pointed out during the argument that this privilege of purchasing meat at a reduced price at Langan's department was an incident of plaintiff's employment in addition to her salary; and that, in exercising that privilege, plaintiff continued in defendants' service, and in the course of her employment, as much as while she was actually engaged in her own department. The most recent authority is *Coldrick v. Partridge, Jones, & Co., Limited* (1), affirming the decision of Bray, J., at the trial. The head-note in that case correctly, I think, summarizes the decision—"Where colliery proprietors, who possessed a railway in connexion with their colliery, were accustomed voluntarily to run a train thereon for the carriage of their colliers, free of charge, from the colliery towards the place where they lived, after their day's work was done, and a collier in their employ, while being so carried, met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway:—*Held*, affirming the judgment of Bray, J., that the deceased man must, as between himself and his employers, be deemed to have undertaken the risk of such an accident, and therefore an action could not be maintained against his employers under the Fatal Accidents Act, 1846, in respect of his death." At p. 534, Bray, J., cites the passage from the judgment of Blackburn, J., in *Morgan v. Vale of Neath Railway Company* (2), to which I have referred, and also the judgment of Pollock, C.B., in the same case, and says that Coldrick's case clearly comes within the principle of *Morgan v. Vale of Neath Railway Company* (2), and proceeds

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(2) 5 B. & S. 570; 33 L. J. Q. B. 265.

K. B. Div. (p. 535): "The deceased would know that from time to time servants of the defendants would or might be employed on or near the line, whether in repairing bridges or other works adjoining the railway, or repairing the permanent way, or in some other way, and that the carelessness of those servants might be the cause of an injury to the train or to those travelling by it. It is a risk he would run if he travelled by the train. It is a risk incident to his employment. It is no answer to say that he could not have contemplated such an accident as this, because it was so unlikely to have happened. However unlikely, it was a possible risk, and he must be taken, in my opinion, to have accepted it"; and adds:—"I should have no hesitation in finding as a fact that the two collieries, including the works above ground and under ground and the railway, were worked as one concern, with one common object, and that each one of the men employed by the defendants there was the fellow-servant of the others, within the rules laid down in the cases I have cited." In the Court of Appeal, Vaughan Williams, L.J., says (p. 544):—"The question has been raised as to how long the implied term with reference to the negligence of fellow-servants to which I have referred must be considered as continuing in operation. It was suggested that, assuming that there was such an implied contract, it ceased to be in operation when the work of the deceased collier for the day came to an end by reason of his having come up from the pit where he was working. It follows from what I have said that I do not think that is so. I think that it continued in operation so long as the collier was using, for the purpose of departure from the colliery, the means provided by the defendants for access thereto and departure therefrom by their colliers, and which both parties knew, at the time of the making of the contract of service, to be intended to be used for that purpose."

In concurring in the judgment of the Court, Farwell, L.J., says (p. 546), in applying the test suggested by Blackburn, J., to the facts of *Coldrick v. Partridge, Jones, & Co., Limited* (1), "I take the word 'necessary' as used by the learned Judge to mean

(1) [1909] 1 K. B. 530. Subsequently affirmed by H. L. [1910] A. C. 77.

necessary if and when the servant chooses to avail himself of the facility afforded by the master. I do not think that, to make the risk in question a natural and necessary consequence of the employment, it is essential that the servant should be bound by the terms of his engagement to make use of that facility; it is sufficient if his use of it by the master's invitation is an incident of his employment." And again, later on (p. 547): "When once the conclusion is arrived at that the deceased man's title to use the train arose from its being a facility which had been for many years provided by his employers for use by their workmen as such, it appears to me that such use of it was an incident of his employment with regard to which he impliedly undertook the risk of any injury arising from the negligence of persons in a common employment with himself as being a natural and necessary consequence of that employment."

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There is no question of contributory negligence on plaintiff's part, nor of negligence on defendants' part of employing an incompetent servant in the present case. The conclusion which I unfeignedly regret to say in this unhappy case I am irresistibly coerced to draw, is that plaintiff's case fails on every point in principle and in authority.

J. G. T.

The plaintiff appealed to the Court of Appeal (1).

Powell, K.C., and *James O'Connor, K.C.* (with them *Chambers, K.C.*, and *Alfred Coffey*), for the plaintiff:—

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The plaintiff's employment was in a particular department, quite distinct in business and in situation from the butcher's stall. She had the privilege of purchasing meat at a reduction, but that was an optional privilege—she was not bound to avail herself of it. When visiting the butcher's stall, she was not doing anything in the course of her employment. Supposing she had a week's holiday, and came to the stores to buy meat, would that be an act done in course of common employment with the butcher? Langan

(1) In the Court of Appeal, before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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was not a fellow-servant within the doctrine of common employment: *Bartonshill Coal Co. v. Maguire* (1); Bevan on Employers' Liability (4th ed.), p. 14. The purchase of the meat was foreign to the plaintiff's employment. She was acting at the time of the accident as a customer of the defendants, not as one of their servants. Lord Brougham said (3 Macq., p. 313):—"To bring the case within the exemption there must be this most material qualification, that the two servants shall be in the same common employment, and engaged in the same common work under that common employment." "Mere contiguity, if unusual or accidental, would not be consistent with common employment": *per* Sir F. Jeune, in "*The Petrel*" (2). In *Morgan v. Vale of Neath Railway Co.* (3), Blackburn, J., speaking of common employment, said:—"There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of one is so much a natural consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages." Applying that test here how could the plaintiff have contemplated risk from Langan's negligence? *Davies v. Rhymney Iron Co.* (4); *Moore v. Manchester Liners, Limited* (5).

Henry, K.C., and Fetherstonhaugh, K.C. (with them *E. S. Murphy*), for the defendants:—

The case is disposed of by the answers of the jury to the fourth and fifth questions. In *Coldrick v. Partridge* (6), Farwell, L.J. says (at p. 545):—"If his" (the workman's) "enjoyment of that privilege had been by contract, the case would have been undistinguishable from *Tunney v. Midland Railway Co.*" (7), and cited from the judgment of Willes, J., in that case. In *Low v. General Steam Fishing Co.* (8), Lord Loreburn, L.C., says, at p. 532:—"A man may be within the course of his employment, not merely

(1) 3 Macq. 300.

(4) 16 T. L. R. 329.

(2) [1893] P. 320, at p. 325.

(5) [1909] 1 K. B. 417.

(3) 5 B. & S. 570. Affirmed in
Exchequer Chamber, L. R. 1 Q. B.
149.

(6) [1909] 1 K. B. 530.

(7) L. R. 1 C. P. 291.

(8) [1909] A. C. 523.

while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety." "You have to look at the character in which the person is invited in order to see what the implied promise is. The master does not undertake that fellow-servants shall use reasonable care, the risk from negligence of the fellow-servants being one which the servant accepts": *per* Bray, J., in *Coldrick's Case* (1). *Davies v. Rhymney Iron Co.* (2) was cited before Bray, J. He did not follow it. It is certainly opposed to *Rowland v. Wright* (3). In *Hedley v. Pinkney SS. Co.* (4) it was held that the master of a ship and the seamen were fellow-servants, overruling *Ramsay v. Quinn* (5). Further, as to course of employment, in cases under the Workmen's Compensation Acts, see *Blovelt v. Sawyer* (6) distinguished in *Brice v. Edward Lloyd, Limited* (7); *Morris v. Mayor of Lambeth* (8), where Collins, M.R., makes use of the expression "the *nexus* between the applicant and his employers had not been destroyed."

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THE LORD CHANCELLOR :—

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I have no doubt that the judgment of the Lord Chief Baron was right. The case is really quite clear. First, I think it was a term of the contract of employment that the plaintiff should be entitled to go to the butcher's stall on the premises, and to buy meat there at a reduced rate. She was acting under the contract when she went to the stall. Every one of the persons employed in the same house as servants of the same master are fellow-servants; otherwise the practice prevalent in these large business houses could not exist. I think that it was by virtue of the contract with her employers the plaintiff went to buy the meat on this occasion. To use the words of Lord Loreburn, L.C., "she would not be there but for her employment." The case comes within *Tunney's Case* (9) referred to by the Chief Baron. But in *Coldrick v. Partridge* (1), which was not a case of contract but of

(1) [1909] 1 K. B., 530. Affirmed
in H. L. [1910] A. C. 77.

(2) 16 T. L. R. 329.

(3) [1909] 1 K. B. 963.

(4) [1894] A. C. 222.

(5) I. R. 8 C. L. 322.

(6) [1904] 1 K. B. 271.

(7) [1909] 2 K. B. 804.

(8) 22 T. L. R. 22.

(9) L. R. 1 C. P. 291.

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privilege, it was held that, as the privilege was incidental to the service, the action could not be maintained. Farwell, L.J., in giving judgment says, at p. 545: "One incident of his employment was that, as a matter not of right but of grace, he was allowed to use, free of charge, a train which his employers ran for the benefit of workmen and others employed at their colliery, but not of outsiders. If his enjoyment of that privilege had been by contract, the case would have been undistinguishable from *Tunney v. Midland Railway Company* (1), in which Willes, J., said, 'The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference: for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be.' That case would be on all fours with the present, if it had been in this case part of the contract between the employers and their servant that he should be carried in this train." That shows his opinion. "But the learned Judge in the Court below has not found that this was the case, and, that being so, I do not feel myself at liberty in this Court to do so. He has however, found that as a matter of invitation by the employers, the workmen employed at the colliery had been in the habit of using, and had never been prevented from using, the train for the purpose of coming to and returning from the colliery where they worked, and that this had been the invariable course ever since the year 1900. Under these circumstances, I think that the enjoyment of that advantage must be regarded as one of the incidents of their employment."

Both on authority and principle, I think, the decision of the King's Bench Division was right, and must be affirmed.

HOLMES, L.J. :—

I concur. The question appears to be very simple. At the time of the accident, was the plaintiff in the service of the defendants? If she were, the injury was caused by the negligence of a fellow-servant.

It is contended by plaintiff's counsel that she was not at the time of the accident acting in the employment of the defendants, but that she stood in an independent relation as a purchaser.

I cannot think that is the nature of the transaction: she was going to the butcher's stall in pursuance of her contract, as she had a right to do, to purchase meat at a certain reduction in price. If she had met with an accident before reaching the place, as, for instance, if she had slipped on the staircase, she would be a servant and entitled to compensation under the Workmen's Compensation Act. That being so, she continued to be a servant while going to the meat department, and this being an accident arising from the negligence of a fellow-servant in the course of a common employment, I am of opinion that she cannot recover. To come to any other conclusion would be inconsistent with decisions of the highest authority under the Workmen's Compensation Act, and with principles on which that statute is now administered.

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CHERRY, L.J.:—

I concur in holding that the case comes within the doctrine of common employment. The argument for the plaintiff was that at the time of the accident she was not in the defendants' employment at all—that she was doing something outside the scope of her employment. But it is clear from the verdict of the jury that she was exercising a privilege which she enjoyed under and by virtue of her contract of service. Therefore the case is brought within the principle of *Tunney v. Midland Railway Company* (1). There a workman was being carried away from his work by train. That was a privilege to which he was entitled under his contract of service, and it was held that the railway company were not liable for the negligence of a guard which led to a collision in which the workman sustained personal injuries, on the ground that the workman and the guard of the train in which the workman was returning to his home were both engaged in a common employment. Here we have also a privilege under a contract of service. *Coldrick v. Partridge* (2) was not so strong a case in favour of the employer as this is. There the privilege

(1) L. R. 1 C. P. 291.

(2) [1909] 1 K. B. 530, on appeal, 538; H. L. [1810] A. C. 77.

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Cherry, L.J.

of returning by train was not a matter of contract but of grace, and all the Judges deal with that circumstance. Farwell, L.J., (1) makes this clear. He says:—"If his enjoyment of that privilege had been by contract, the case would have been undistinguishable from *Tunney v. Midland Railway Company* (2), in which Willes, J., said, 'The circumstances of the plaintiff's day's work being at an end when the accident happened can make no difference; for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be.' That case would be on all fours with the present, if it had been in this case part of the contract between the employers and their servant that he should be carried in this train; but the learned Judge in the Court below has not found that this was the case; and that being so, I do not feel myself at liberty in this Court to do so. He has, however, found that, as a matter of invitation by the employers, the workmen employed at the colliery had been in the habit of using, and had never been prevented from using, the train for the purpose of coming to and returning from the colliery where they worked, and that this had been the invariable course ever since the year 1900. Under these circumstances I think that the enjoyment of that advantage must be regarded as one of the incidents of their employment."

Here it has been found by the jury that it was a term of the employment that the plaintiff should be at liberty to purchase meat at a reduced price. She was exercising that privilege during her ordinary hours of service when the accident occurred, and the difficulty arising from the voluntary character of the privilege, which pressed the Court in *Coldrick v. Partridge* (3), does not exist.

Solicitor for the plaintiff: *R. O. Norwood.*

Solicitors for the defendants: *Falls & Co.*

W. G.

(1) [1909] 1 K. B., p. 545.

(2) L. R. 1 C. P. 291.

(3) [1909] 1 K. B. 530, on appeal, 538; H. L. [1910] A. C.

IN THE MATTER OF A DEBTOR'S SUMMONS BY
PIM BROTHERS, LIMITED, v. SHIEL (1).

Appeal.
1910.

Mar. 11.

Debtor's summons—Bankruptcy—Amount of debt—Indorsement of summons—Notice—Particulars of demand—Affidavit—Trivial discrepancy—Form.

It is not necessary for the validity of a debtor's summons that the prescribed forms should be literally followed; it is sufficient if they have been in substance complied with, and that the debtor has not been misled and knew of the indebtedness alleged against him.

APPEAL by the debtor from an order of Ross, J. (sitting for Boyd, J.), dated the 4th March, 1910, refusing an application made on behalf of the debtor to set aside the debtor's summons issued in this matter on the 24th February, 1910, and served the same day. The grounds on which the debtor's summons was impeached were—(a) irregularity and violation of the practice of the King's Bench Division (Bankruptcy), Statutes and Orders regulating the procedure, (b) suppression of material facts, (c) failure to serve particulars of demand prior to the service of the summons, (d) that the service of the debtor's summons was contrary to good faith, and was made for the purpose of compelling the debtor to give a fraudulent preference to Messrs. Pim Bros., Limited, as against his other creditors.

The debtor's summons was in the prescribed form (see Rules (S. C. I.), 1905, App. V., No. 4), claiming £420 19s. 5d. The indorsed particulars of demand consisted of items for goods sold from August 7th, 1909, to February 3rd, 1910, amounting to £485 19s. 5d., and credits for payments from October 7th, 1909, to February 1st, 1910, amounting to £65, leaving the said sum of £420 19s. 5d. due.

(1) Before THE LORD CHANCELLOR and THE MASTER OF THE ROLLS.

Appeal.
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The summons was issued on an affidavit made by William Frederick Layng, chief accountant of Messrs. Pim Bros., Limited, which was as follows :—

1. That Isaac Shiel of Foxford, in the county of Mayo, grocer, spirit dealer, and draper, is justly and truly indebted to Pim Bros., Limited, of 22 William Street, in the city of Dublin, wholesale warehousemen, in the sum of £424 3s. 9d., for goods sold and delivered, the particulars whereof are contained in the statement of account now produced and shown to me, and marked with the letter "A."

2. That the said Isaac Shiel is a trader within the meaning of the statute.

3. That, in accordance with the practice of the said Pim Bros., Limited, statements of the amount of the said account have been sent by post to the said Isaac Shiel at Foxford on or about the 1st day of each month (1).

4. That the said Isaac Shiel is unable to meet his engagements with his creditors, and has instructed Messrs. Craig, Gardner, & Co. to investigate his affairs, and I beg to refer to a letter from Messrs. Craig, Gardner, & Co., to the said Pim Bros., Limited, now produced and shown to me, and marked "B."

5. That frequent and repeated applications have been made to the said Isaac Shiel both personally by the said Pim, Bros.' traveller, and through the post, for payment of the said debt, and payment of the same has been on more than one occasion demanded from him.

6. That the said Pim Bros., Limited, hold no security, or bills or notes, for the said debt, save a policy of assurance on the life of the said Isaac Shiel, with the Friends' Provident Institution, for £200. Sworn, &c.

The only colour for the charge that the summons was issued to compel a fraudulent preference was that on the 23rd February, 1910, the debtor had an interview with Mr. H. L. Pim, managing director, and Mr. W. J. O'Connor, wholesale manager for Pim Bros.; and, representing himself as perfectly solvent, asked for further credit.

(1) Copies of these monthly accounts were produced in Court.

This they declined to give without a deed of charge. This deed was prepared and ready for execution the following day (24th February). The debtor, at 12.30 p.m. on that day, took away the engrossment to consult with his brother-in-law, promising to return at 1.45 p.m. to execute the same. He did not return, and never executed the deed. Later on in the same day, the summons was issued and served.

Pim Bros. had on several occasions written, pressing for payment, or even an instalment of the debt.

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Ronan, K.C. (with him, *M'Gonigal*), for the appellant:—

According to Layng's affidavit (paragraph 5), the previous demands were for the "said debt" *i.e.* £424 3s. 9d.

The prescribed forms of affidavit and particulars of demand are given in Wylie's Judicature Act, pp. 1544, 1545, Appendix V., Forms 2, 4. If the particulars indorsed on the debtor's summons are true, paragraph 1 of the affidavit is absolutely contrary to the fact. This procedure under section 30 of the Bankruptcy (Ireland) Act, 1872, was taken from the English Bankruptcy Act, 1869, s. 7. Under section 21 (6) non-payment of the sum charged in a debtor's summons is an act of bankruptcy. Speaking in 1873 of the procedure by debtor's summons in England, Lord Selborne said in *In re Hodges* (1), "This is a special statutory proceeding involving important consequences, and all proper forms must be strictly complied with." See *In re Moore* (2). The procedure in England was found to be so harsh and oppressive, that when the Act of 1869 was repealed, and the Act of 1883 took its place, the procedure by debtor's summons was dropped, and section 4, sub-sect. 1 (g), of the Act of 1883 was limited to cases in which judgment had been recovered; but in Ireland this procedure, which had been so often denounced by English Judges, was suffered to continue unchanged. In 1884, Lord Bramwell used, with respect to the Act of 1869, the following remarkable expressions: "I think it an unbecoming thing as a rule in those who have the administration of the law to speak disrespectfully of it; but I feel justified in making an exception in the case of this

(1) L. R. 8 Ch. App. 204.

(2) [1907] 2 I. R. 151.

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unhappy Act of Parliament, which is no longer law, and has not been repealed for its merits. In my opinion, it ought to be construed upon the footing that the construction should lead to an absurdity rather than otherwise": *Hill v. East and West India Dock Company* (1).

Pim, K.C., and *Louis Kelly*, for Messrs. Pim Bros. Limited, were not called on.

THE LORD CHANCELLOR:—

We do not think it necessary to hear the respondents' counsel in this case. We have held in this Court in two cases (*M.'s Case* (2) and *C.'s Case* (3)) decided subsequently to *Moore's Case* (4) that it is not necessary to follow literally the prescribed forms. It is enough if they have been complied with in substance, and the debtor has not been misled, and knew the indebtedness alleged against him before the issue of the debtor's summons. The debtor in this case was sent monthly statements of account, from which I am perfectly satisfied he knew that the admitted amount was due, and that he could have ascertained the amount of his indebtedness by totting up the items in these accounts, which he must have retained. That he knew that this amount was due, is apparent from the appearance in his statement of affairs that about £420 was due. We have nothing to say to the question whether the proposed mortgage, which was not in fact executed, would be a preferential payment or not. Messrs. Pim Bros. thought that they were badly treated, and therefore insisted on their legal right to issue a debtor summons. It appears that, along with the debtor's summons, a notice was served stating the debt at the true amount of £420 19s. 5d.

We had this point recently before the Court in *M.'s Case* (2) and *C.'s Case* (3). In *Moore's Case* (4), on which Mr. Ronan relied, the paragraph relating to the particulars and demand was entirely omitted. What we have to see is "that sufficient particulars are given to inform the debtor of the nature and amount of the debt."

(1) 9 A. C. 448, at p. 465.

(3) *Ibid.* 204.

(2) 42 Ir. L. T. R. 203.

(4) [1907] 2 I. R. 151.

In this case we think there was no misleading, and that the debtor was given full materials for ascertaining, and in fact knew, the amount of the debt due by him. The order of Ross, J., was right, and the appeal must be dismissed with costs.

Appeal.
1910.

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SHIEL.

The Lord
Chancellor.

THE MASTER OF THE ROLLS concurred.

Solicitors for the debtor : *Casey & Clay.*

Solicitor for Messrs. Pim Bros. : *Felton.*

W. G.

THE KING (SINNOTT) *v.* LOCAL PENSION COMMITTEE OF THE COUNTY OF WEXFORD AND THE No. 1 SUB-COMMITTEE (1).

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1910.

Feb. 7, 8, 14.

Old Age Pensions Act, 1908 (8 Edw 7, c. 40), ss. 2, 7—Statutory condition that person must have attained the age of seventy years—Pension allowed by Local Pension Committee—Conclusiveness of decision—Certiorari.

It is a condition precedent to the jurisdiction of a local pension committee to allow a pension under the Old Age Pensions Act, 1908, that the claimant should have attained the age of seventy years, and if the claimant has not, in fact, attained that age, the decision to allow the pension, although not appealed from within the prescribed time, is not final and conclusive. If after the allowance of the pension it is shown that the claimant had not attained the age of seventy years, the Local Pension Committee may, on a question raised by the pension officer, disallow the pension.

Quære: if the decision of a Local Pension Committee allowing or disallowing a pension is the subject of *certiorari*.

CERTIORARI.

The prosecutrix, Anne Sinnott, on the 8th October, 1908, duly made a claim for an old age pension of 5s. per week, under the Old Age Pensions Act, 1908. The claim was referred to the Local Pension Sub-Committee of the District of Wexford, No. 1, and was referred by the Sub-Committee to the pension officer of

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

K. B. Div. the district for report and inquiry. He reported to the Sub-Committee in favour of the pension being granted, relying on a certificate given by the parish priest that the prosecutrix had been born in the year 1835, and the Sub-Committee, on the 9th December, 1908, decided to allow the claim. No appeal was taken from this decision, and the pension was paid to the prosecutrix from the 1st January, 1909, up to the 4th June, 1909. After the decision of the Sub-Committee allowing the claim, the pension officer ascertained that the census return for the year 1851 contained a return of the prosecutrix as being then of the age of eight years. He consequently raised a question by forwarding to the Clerk of the Pension Sub-Committee a report in writing, dated the 24th March, 1909, in the form prescribed by the regulations under the Old Age Pensions Act, stating that he desired to raise the question in reference to the pension of the prosecutrix, whether the pensioner was entitled to receive a pension under the Old Age Pensions Act, and reporting that he had investigated the question, and that, in his opinion, the prosecutrix was not entitled to any pension, as she had not reached the statutory age, the census returns showing that she was eight years of age in 1851.

The question and report came before the Pension Sub-Committee at their meeting on the 29th March, 1909, and, after several adjournments, the question was considered by the Sub-Committee at a meeting held on the 1st June, 1909, when the Sub-Committee decided that the prosecutrix was not entitled to a pension, being one year short of the required age, according to a census return of 1841, obtained by herself. The census return of 1841, so referred to, had been sent to the Clerk of the Pension Sub-Committee by a lady in whose employment the prosecutrix was. On the 5th June, 1909, the postmaster of the post-office at which the pension was payable informed the prosecutrix that the pension had been stopped.

The prosecutrix on the 22nd July, 1909, obtained a conditional order for a writ of *certiorari* to remove, for the purpose of being quashed, the order and adjudication of the Local Pension Sub-Committee of the 1st June, 1909, disallowing the pension already awarded to the prosecutrix, on the ground that the said

order and adjudication were made without jurisdiction, inasmuch as the said Sub-Committee having in or about the month of December, 1908, considered and determined the question of the age of the prosecutrix, and having decided that she was of the statutory age, and awarded her a pension under the Old Age Pensions Act, 1908, had no power under said Act to re-open the question of the age of the prosecutrix, to decide she was not of the statutory age, and disallow the pension already awarded.

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Cause against making the conditional order absolute was shown on behalf of the Commissioners of Customs and Excise.

The prosecutrix, in an affidavit made by her in reply to affidavits filed on behalf of the Commissioners of Customs and Excise, stated that the census return of 1841 had been sent without her knowledge, instructions, or authority. She further alleged that the entry in the return stating that she was then of the age of one year was not correct, as she was at the date of her application for the pension upwards of seventy years of age.

The present application was on behalf of the prosecutrix to make the conditional order absolute, notwithstanding cause.

James O'Connor, K.C. (with him Lupton), for the prosecutrix :—

Certiorari lies. *The King (Pawley) v. Local Government Board* (1) shows that the decision of the Local Government Board on an appeal from the Local Pension Committee is subject to *certiorari*, and the same principle must apply to a decision of the Local Pension Committee or Sub-Committee which has not been appealed from. [He also referred to *Rex v. Sunderland Justices* (2).]

The decision of the Pension Sub-Committee of the 1st June, 1909, that the prosecutrix was not entitled to a pension, was made without jurisdiction, inasmuch as their decision on the 9th December, 1908, allowing the claim for a pension, not having been appealed from, was final and conclusive: Old Age Pensions Act, 1908, section 7, sub-section 2. We do not say that the decision would be final and conclusive in case of a fraudulent misstatement of age, but no fraud is alleged in the present case. Counsel on the other side may rely on the provisions in section 7, sub-section 1, of the Act,

(1) 44 I. L. T. R. 7.

(2) [1901] 2 K. B. 357.

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 1910. continue to be fulfilled in the case of a person in receipt of a
THE KING pension, or whether a person is disqualified for receiving or con-
 (SINNOTT) tinuing to receive a pension; but the power to raise a question
v. under these provisions must be confined to cases where some new
LOCAL PEN- circumstances intervene subsequently to the making of the order.
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The only matter open for consideration is, not whether the statutory conditions were fulfilled at the time of the decision on the claim, but, assuming that they were fulfilled, whether they continued to be fulfilled: *The King (Pawley) v. Local Government Board* (1), *per* Palles, C.B. The question, therefore, whether the statutory conditions continue to be fulfilled, cannot be raised as regards the condition as to age. The words "whether a person is disqualified for receiving or continuing to receive a pension" refer, not to the statutory conditions mentioned in section 2, but to the disqualifications mentioned in section 3. Section 9, sub-section 2, also must be taken to be confined to some new circumstances subsequently arising.

The Attorney-General (The Right Hon. Redmond J. Barry, K.C.) and *The Solicitor-General (Charles O'Connor, K.C.)* (with them *Coll.*), for the Commissioners of Customs and Excise:—

The question here was raised with respect to the first of the statutory conditions mentioned in section 2. It is important to note the difference in phraseology between the first condition and the other two conditions. The second and third conditions are prefaced by the words—"The person must satisfy the pension authorities." No such words are used with respect to the first condition, which is absolute:—"The person must have attained the age of seventy." The attaining the age of seventy is, therefore, a condition precedent to the jurisdiction of the Pension Committee to grant a pension. If the claimant has not, in fact, attained that age, the decision to grant the pension is made without jurisdiction, and may be questioned at any time subsequently. The provision in section 7, sub-section 2, making the decision of the Pension Committee final and conclusive, can have no application to a case where the decision was made without jurisdiction.

There is express power given by section 7, sub-section 1, to question the original decision. A question may be raised at any time as to whether the statutory conditions continue to be fulfilled. A condition cannot continue to be fulfilled if it never existed. The contention on behalf of the prosecutrix as to the construction of this provision in effect comes to this, that the general words "statutory conditions" are to be cut down so as to read "statutory conditions Nos. 2 and 3." In *The King (Pawley) v. Local Government Board* the Lord Chancellor declared he expressed no opinion on the question whether there might not be a case in which an order granting or refusing a pension might not be reconsidered, though no change of circumstances was shown to have originated after the date of the order. Holmes, L.J., states that he is disposed to think that the matter might be re-opened, not only when there has been a subsequent change of circumstances, but where the claimant or pension officer has subsequently ascertained the existence of relevant facts, or evidence of such facts previously unknown to him. Cherry, L.J., guards himself from expressing an opinion on the point, but considers that there are difficulties in holding that there is no jurisdiction to deprive a man of his pension, once granted, unless there is evidence of a change in his circumstances (1). Section 9, sub-section 2, is strongly in favour of our view. In *The King (Pawley) v. Local Government Board* (2), Pallet, C.B., admits that for the purposes of this sub-section the decision of the Pension Committee is not final and conclusive. It would be an absurd result that the Treasury should be obliged to go on paying the pensioner with one hand, and, under this sub-section, getting the money back with the other. All that the Act of Parliament means by saying in section 7, sub-section 2, that the decision is to be final and conclusive, is that it is to be binding until overridden by some of the other provisions of the Act.

The decision of the Pension Sub-Committee on the question raised by the pension officer was not a judicial act, and is not the subject of *certiorari*.

(1) These statements of the Lord Chancellor, and Holmes and Cherry, L.JJ., were cited from an authorized copy of the judgments in the Court of Appeal.

(2) 44 I. L. T. R. 7.

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Lupton, in reply :—

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Sub-section 2 of section 9 must be read in connexion with sub-section 1, and is restricted to cases of fraud.

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Cur. adv. vult.

Feb. 14.

LORD O'BRIEN, L.C.J. :—

The question presented for our determination in this case is one of considerable importance. The facts are few. A woman named Sinnott obtained from the Local Pension Committee of county Wexford an old age pension on the basis that she was seventy years of age. After the lapse of some months, during which she was in receipt of the pension, it was discovered that when the order awarding her the pension was made she had not yet reached the age of seventy. Thereupon the Local Pension Committee cancelled the order, and refused to continue paying the pension. Were they justified in law in so doing? Was there legal sanction for what they did? I am of opinion there was.

I may shortly state the grounds upon which I think the case should be decided. I glanced at the main ground of our decision at an early stage of the argument, but it was afterwards more fully developed by my brothers Gibson and Boyd. It was this, that it was plain on the language of the 2nd section of the statute (clause 1) that it was a necessary condition precedent to jurisdiction to award an old age pension that the applicant for a pension should have attained the age of seventy years; and that, if the applicant had not attained that age, the Local Pension Committee had no authority whatever to grant a pension. This is plain from the language of the 1st clause of the 2nd section of the statute taken by itself, but appears still plainer when the 1st clause is read in connexion with the 2nd and 3rd clauses. The 1st clause provides in peremptory terms that the person applying for the pension must have attained the age of seventy years, but the 2nd and 3rd clauses make the matters therein referred to ascertainable by proof satisfactory to the Pensions Authorities. The 1st clause makes the attainment of the age of seventy a rigid, inexorable condition; and, however the existence of that condition may be attempted to be ascertained, if the person applying has not in fact

reached the age of seventy, no authority, no jurisdiction exists to award a pension—and it must be remembered that a tribunal of limited authority cannot give itself jurisdiction by an erroneous finding as to a matter of fact which is antecedent and essential to jurisdiction. The original order which awarded the pension was bad; and the Pensions Authorities were clearly justified in stopping the payment of pension. They were fully justified in saying to the applicant for payment of the pension that the original allowance of it was not justified, because she had not reached the age of seventy when it was made; and we, this Court, are, in my opinion, justified in saying that we will not grant a *certiorari* to enable the second order to be set aside in order that an attempt may be made to rely on the first order, which was clearly unauthorized. Granting a writ of *certiorari* would be useless, because the first order being made without jurisdiction, the Pensions Authorities could say—"We refuse to pay under that order; the condition precedent not having been complied with, you are not entitled to the money." Indeed, the second order, which it was quite competent for the Pensions Committee to make, was, in fact, a declaration of nullity of the first order.

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But in any view of this case, in whatever way it is regarded, I think the Pensions Authorities, in considering the question whether the condition on which the first order was granted continued, were perfectly justified in saying that it did not continue; it never existed. Continuance connotes a prolongation of a previously existing condition; and, if there was no previously existing condition, there could be no prolongation, no continuance of it. This view clearly harmonizes with the 9th section of the Act of Parliament, which provides that, "if at any time it be found that a person be in receipt of an old age pension, without having reached the age of seventy years, such pension may be recovered back." Certainly it would be wholly incongruous that an obligation to pay the pension, and a power to enforce the repayment of that pension—a power to get it back—should co-exist.

I deal with the case wholly independently of fraud, because none is imputed, and in the case of fraud different considerations would apply. The view I have taken gets rid of all difficulty arising from the words "final and conclusive," because orders

K. B. Div. are final and conclusive only when made within jurisdiction; and not, as here, when the case is one in which the original order was made without jurisdiction. Orders may be final and conclusive, so as to protect outsiders, so to speak, for example, the post office authorities, who paid the pension; but certainly are not final and conclusive as regards the persons in whose favour the orders were made. But, as I have said, in any view of the case there was power to make the declaration of nullity which the second order in effect was.

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I have dealt with the case on the assumption that orders of the Pensions Committee are in the nature of judicial decisions, which can be challenged by *certiorari*; but as to this, I confess I am not free from doubt. I think it might with some plausibility at least be argued that these so-called orders are mere administrative minutes, not challengeable by *certiorari*. This case is quite different in its facts from *Pawley's Case* (1), and we must be careful to bear in mind the very guarded observations of each member of the Court of Appeal in that case, towards the close of his judgment, as to the effect of the discovery, not only of new facts, but of *new evidence*. In any view of the case, there was, as I have already said, power to make the second order which the Pension Committee did make.

The motion must be refused with costs.

GIBSON, J. :—

The applicant's proposition is, that once a pension is allowed, the claimant thereby acquires, so far as regards the first or age condition, a conclusive pensionable *status* as against the Pension Committee; the jurisdiction of that body under section 7 being confined, it is said, by necessary implication to conditions 2 and 3, which alone are capable of supervening alteration.

The statutory conditions created by section 2, and the disqualifications created by section 3, are peculiarly within the knowledge of the pensioner, and in many cases pensions might be allowed or paid to persons not entitled to receive the same. The first statutory condition is absolute, and the Committee cannot

(1) 44 I. L. T. R. 7.

by determining wrongly that the applicant is seventy years of age, confer upon him by their mistake a right to pension which the statute does not give him. No doubt, they must make a preliminary inquiry as to age, to guide their decision and subsequent administrative action; but they cannot by an erroneous finding of fact impose liability to continue unlawful payments. The decision is in its essence provisional and conditional. The nature of such a jurisdiction as has to be exercised in dealing with absolute conditions precedent is discussed by me in *De Vesci's Case* (1), and is explained with great clearness by Fletcher Moulton, L.J., in the *North-Western Rubber Company, Limited, Case* (2).

The second and third conditions require the Pension Authorities to be satisfied, and both relate to matters as to which mistakes and frauds are obviously possible. All the three conditions are described as conditions for the *receipt* of an old age pension.

Section 3 imposes disqualifications for receiving, or continuing to receive, an old age pension, and such disqualifications are of a character peculiarly likely to escape the attention of the Pension Authority and officer.

Section 7 confers a power of correction and revision, subject to which the decision of the Pension Authority is "final and conclusive." In my opinion the expression "the statutory conditions" means all the statutory conditions. The condition as to age does not continue to be fulfilled if the pensioner was not seventy years of age at all. The phrase "continue to be fulfilled" occurs in section 1, and must there include all the initial qualifications. So the words "is disqualified for receiving or continuing to receive a pension" must include an initial disqualification which, existing at the time when the pension was allowed, has been from accident or otherwise overlooked: *O'Connell v. Hastings* (3). The clear plan of the Act is to disable unqualified or disqualified persons from receiving pensions, and to authorize the Pension Authorities to stop improper payments. The provision making the decision of the Pension Authority "final and conclusive" is manifestly subject to the power of correction conferred by section 7,

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(1) [1908] 2 I. R., at p. 303.

(2) [1908] 2 K. B., at p. 921.

(3) [1905] 2 I. R., at p. 610.

K. B. Div. sub-sect. 1 (a), (b), (c), (d), and to the right of refund given by 1910. section 9, sub-sect. 2.

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For administrative purposes, till error or illegality is brought to light, the decision of the Pension Authority is binding and must be acted on; but section 9, sub-section 2, demonstrates that, whether the decision is cancelled or not, the unqualified or disqualified recipient of a pension can be compelled to repay in an independent collateral proceeding. Sub-section 2 cannot be restricted to cases of fraud dealt with by sub-section 1, and the words "it is found" do not point to any judicial declaration by the Pension Authority, which could have no jurisdiction after the pensioner's death, but merely indicate that the fraud or mistake has been found out. The sub-section omits the word "continue" which occurs in section 1 and section 7, sub-section 1, and it is decisive that the Pension Authority must possess full jurisdiction to put a stop to payments to unqualified or disqualified persons. It would be quite irrational that pensions should continue to be paid as of right to persons who could at once be sued and compelled to pay back the sums received. A pensioner receiving less than 5s. can, on proof of diminution of means, apply for an increase. On such application, could he allege that, though not seventy, his pensionable status was finally settled by the original allowance of pension?

With regard to *Pawley's Case* (1), it has no bearing on the present controversy. The dispute there was as to income, and the power of the Local Government Board to cancel a pension on a pensioner's appeal where the facts as to income on which the pension had been assessed by the Pension Committee remained unaltered. Here the pension has been declared illegal on new evidence of the character prescribed in the official instructions to pension officers, and the applicant was given a full opportunity of making her case. Having regard to the duties and kind of information contemplated by section 7, I should have been inclined to think that the function of the Pension Authority was administrative, not judicial, and that the words "final and conclusive" were intended to exclude direct Treasury, Governmental

and judicial interference with the action of the Pension Authority : *K. B. Div. Kydd's Case* (1) ; *The Gordon Hotels Case* (2). In *Pawley's Case* (3) 1910. it was, however, held or assumed that *certiorari* lay. But there may be a distinction between a case where there is a *lis* and an appeal, and a case of simple allowance and disallowance of a pension, just as under the English licensing code *certiorari* was available in case of an appeal : *Rex v. Sunderland Justices* (4), though it was not applicable to the decision of the primary licensing meeting. The mere allowance, or disallowance, or stoppage of a pension, by a body such as the Pension Authority, is very like an administrative act ; it no doubt affects pecuniary interests, but not more than the grant or refusal of a licence in England for drink or dancing, or an income-tax assessment, or rating of a person who disputes liability as not being occupier, in which case there would be no jurisdiction to rate. I am not aware of any example of *certiorari* being extended to a case of the present type.

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I would add that, though such a case is hardly likely to occur, even though there is no new evidence proper, still, if owing to mistake of law, oversight, &c., a pension is found to have been improperly allowed, the Pension Authority has jurisdiction to act, and can and ought at once to terminate the unlawful payment. The right to arrest payment and the obligation to refund unlawful payments should be co-extensive. A person should not be entitled to compel the continuance of a payment which he must, when received, at once be liable to pay back.

BOYD, J. :—

I concur in the judgments of the Lord Chief Justice and my brother Gibson. The first section of the Act provides that every person in whose case the statutory conditions of the Act are fulfilled shall be entitled to a pension under the Act so long as those conditions continue to be fulfilled. The applicant in the present case is not seventy years of age ; and it is contended on her behalf that her claim, having been allowed, the condition as to age cannot

(1) [1908] A. C., at p. 331.

(3) 44 I. L. T. R. 7.

(2) [1907] 1 K. B. 410.

(4) [1901] 2 K. B. 357.

K. B. Div. therefore be disputed, and must be held to "continue." It is, however, important to consider the provisions of the statute as to the conditions under which persons become entitled to pensions. These conditions are specified in section 2. By sub-section 1 of this section it is provided, "The person *must* have attained the age of seventy." This provision is absolute and unqualified, and unless the person has attained that age no right to a pension can exist. Sub-sections 2 and 3 of section 2 then provide that "the person (so qualified) must satisfy the pension authorities" as to the non-existence of the disqualifications mentioned therein. Sub-section 1 does not require the person to satisfy the Pension Authorities as to age, and absolutely disqualifies anyone who is under the age of seventy from receiving or being entitled to any pension.

Section 7 provides for the "determination of claims and questions," and provides that "all claims for old age pensions under this Act, and all questions whether the statutory conditions are fulfilled in the case of any person claiming such a pension, or whether those conditions continue to be fulfilled in the case of a person in receipt of such a pension, or whether a person is disqualified for receiving or continuing to receive a pension, shall be considered and determined" as in said section specified; and by sub-section (2) enacts that "the decision" of the authorities mentioned "shall be final and conclusive." It has been contended on the argument of this case on behalf of Mrs. Sinnott, that her right to receive a pension having heretofore been allowed, she cannot now, though under the statutory age, be disqualified on the ground of age from continuing to be paid the same.

However, in my opinion, section 9, sub-section 2, disposes of this contention, for it is thereby provided that "if it is found *at any time* that a person has been in receipt of an old age pension under this Act, while the statutory conditions were not fulfilled in his case . . . he or, in the case of his death, his personal representative shall be liable to repay to the Treasury any sums paid to him in respect of the pension while the statutory conditions were not fulfilled," &c. Having regard to this provision, it seems impossible to yield to the contention as to the finality

of the decision of the local authorities as mentioned in section 7. *K. B. Div.*
 In the case of *The Attorney-General v. Barrett* (1), it was held, in 1910.
 accordance with previous decisions referred to by the Lord *THE KING*
 Chancellor, that similar words did not oust the jurisdiction of the *(SINNOTT)*
 Court of Chancery or the Courts of Law from reviewing the *v.*
 adjudication complained of. *LOCAL PENSION COM.,*
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As the Act only confers a right to pension on persons over
 seventy years of age, no powers which were conferred on the Local
 Pension or the Central Pension Authority could enable those
 bodies to confer a pension on any person under that age. On these
 grounds I concur in the judgments which have been delivered by
 the Lord Chief Justice and my brother Gibson.

Boyd, J.

Solicitors for the prosecutrix: *M. J. O'Connor & Co.*

Solicitor for the Commissioners of Customs and Excise: *The*
Solicitor of Inland Revenue.

J. G. T.

(1) Ir. R. 3 Eq. 392.

Appeal.
1909.

THE MAYOR, &c., OF LIMERICK *v.* CROMPTON AND
COMPANY, LIMITED (1).

Feb. 10, 12.

Contract—Action of—Practice—Staying proceedings—Agreement to refer matters in dispute to English Court.

A contract made between the Corporation of L., in Ireland, and C. & Co., Ltd., a Company having its registered office in England, and carrying on business there, contained a clause that the contract should “in all respects be construed and operate as an English contract, and in conformity with English law.” The contract was made in Ireland, and the works to be done under it were to be executed there. An action for damages for breach of the contract having been instituted in the Irish Court by the Corporation of L. against C. & Co., on a motion by C. & Co. to stay all further proceedings in the action:—

Held, affirming the decision of the King’s Bench Division, that upon the true construction of the contract the parties thereto had agreed (while not purporting to oust for all purposes the jurisdiction of the Irish Courts) that the contract should be carried out in procedure under it, as if it had been made in England, and that therefore the King’s Bench Division had rightly exercised its discretion in staying the action.

APPEAL by the plaintiffs from an order of the King’s Bench Division staying the action. See [1909] 2 I. R. 120, where the material portions of the contract sued on are given.

Ronan, K.C., and *Charles F. Doyle, K.C.* (with them *P. Kelly*), for the appellants:—

The order appealed from was based on a misconstruction of the contract. It is plain that the judgment of the Court as

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZ GIBBON and HOLMES.

delivered by Andrews, J., proceeded on the assumption that the parties had thereby agreed that the Irish Courts should have no jurisdiction to determine any dispute arising out of the contract, that English jurisdiction was exclusive, and the English Court was the forum selected for the determination of such questions, under *Nash v. Fischer* (1), which was erroneously supposed to be applicable. Even if such a stipulation were valid in law, it is not to be found in the contract according to its true construction. What is there in clause 48 to oust the jurisdiction of the Irish Courts, and to deprive the plaintiffs of the right as plaintiffs domiciled in Ireland to sue on a contract made in Ireland, and to be performed in Ireland? All that is said is that this contract is to be construed and operate as an English contract, and in conformity with English law. The defendants contend that this amounts to an agreement that contract is to be enforced in England and not elsewhere. But there is nothing to that effect in the contract itself. "To operate" as an English contract does not mean that it is to be deemed to have been made in England contrary to the actual fact.

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1909.

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The contract defines the law by which it is to be interpreted, and not the tribunal to adjudicate. The Irish Courts can declare and interpret English law, just as English Courts can deal with statutes exclusively relating to Ireland. *Prima facie* the case comes within Ord. XI. R. 1 (f). If an Irishman sued on a similar contract in England, he would have no remedy, because the English Courts could not enforce their process in Ireland.

[They cited *Tharsis Sulphur Co. v. Société Industrielle* (2); Dicey's Conflict of Laws, Book 3, p. 456; *British Wagon Co. v. Gray* (3); *Spurrier v. Lacleche* (4); *Hoerter v. Hanover Caoutchouc Gutta-percha and Telegraph Works* (5).]

(1) [1909] 2 I. R. 122.

(4) [1902] A. C. 446.

(2) 60 L. T. (N. S.), 924.

(5) 10 T. L. R. 22, 103.

(3) [1896] 1 Q. B. 35, Ord. XI.,
R. 1 (e) Eng.

Appeal. *FitzGibbon, K.C., and Poole, for the respondents.*

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LIMERICK
CORPORATION *v.* CROMPTON. [Their arguments were in substance the same as given in the report of the cases in the King's Bench Division.]

Ronan, K.C., replied.

Feb. 12.

THE LORD CHANCELLOR:—

Mr. Ronan's principal argument was founded on some passages in the judgment of Mr. Justice Andrews, in which, taken by themselves, he would appear to have gone further than I am prepared to go. The contract was made within the jurisdiction, and, therefore, the provisions of Order XI., R. 1 (*f*), are *prima facie* attracted. But, in order to consider whether the jurisdiction under the Rule ought to be exercised, we must look to the contract, and especially to clause 48. It is obvious that this clause applies to the whole contract. There are two provisions in it. First, that it shall be construed in all respects as an English contract; secondly, that it shall operate between the parties in all respects as an English contract—that is, it shall be carried out in point of procedure under it as if had been made in England. That is the meaning of giving it operation as an English contract. The words “construed” and “operate” must be given effect to. I do not think the Court is necessarily deprived of jurisdiction under Rule 1 (*f*), but I think, when exercising that jurisdiction, the Court is bound to exercise its discretion, unless some paramount reason to the contrary is shown, by giving effect to the words in the contract which make it operate as an English one, and adopt as the forum what the parties have inferentially agreed that it should be.

FITZ GIBBON, L.J.:—

I will only say that my interpretation of the words “shall operate as an English contract” is that the contract is to operate as if it had been made in England, and is to be carried out according to English law, that is as distinguished from Irish law; and we

cannot consistently with our rules disregard the agreement between the parties to that effect. I think that was all that Mr. Justice Andrews meant, and that he meant no

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HOLMES, L.J.:—

The plaintiffs are an Irish, the defendants an English, Corporation. The cause of action is for breach of a contract made in Ireland. The appellants contend under these circumstances that under Order XI., Rule 1 (*f*), they are entitled to an order allowing them to serve the writ of summons issued in the Irish High Court on the respondents in England. *Prima facie* the action comes within the Rule. But the defendants rely on a term of the agreement (of which Wright, J., was not informed), that the contract shall in all respects be construed and operate as an English contract and in conformity with English law, and all payments under it shall be made in England.

Mr. Ronan in opening the appeal, and in his reply, argued—first, that the Divisional Court held that the effect of this stipulation was to deprive the High Court in Ireland of all jurisdiction over the contract, and to make any controversy under it determinable in England alone; secondly, that this was not the true construction of the contract. In the second proposition I concur.

I agree with Mr. Ronan that the true meaning of the provision is that the contract, both in its construction and operation, is to be regarded as a contract made in England. But our Irish Courts are in the habit of adjudicating on such a contract with complete jurisdiction, just as English Courts adjudicate on Irish contracts. The difficulty that frequently arises is in bringing the person against whom relief is sought before the Court. I hold in point of fact that this contract was made in Ireland, but I also hold that the parties agreed that it was to be regarded as made in England. I am not prepared to say that this deprives the Court of jurisdiction to make an order under Rule 1 (*f*). I doubt that by such a stipulation the parties can free themselves from the authority of a Rule having the force of a statute.

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An order for service out of the jurisdiction might be made, if necessary for the proper trial of the action; or if, without such an order, there could not be a trial at all. But I hold, without hesitation, that a Court in the exercise of its judicial discretion ought, in the absence of convincing reasons to the contrary, to support the agreement of the parties to treat this contract as if entered into in England.

Solicitor for the plaintiffs: *Dundon.*

Solicitors for the defendants: *Bowles & French.*

W. G.

THE KING (M'CARTHY) *v.* THE JUSTICES OF THE COUNTY CORK (1). K. B. Div.
1910. !

Feb. 2, 3.

Labourers Acts, 1883-1906—8 Vict. c. 20 (Railways Clauses), section 7—Justices—Jurisdiction—Acquisition of land compulsorily—Mistake as to plot taken—Certiorari—Discretion of Court.

Appeal.
April 18, 20.

Under section 7 of the Railways Clauses Act, 1845, incorporated with the Labourers Acts by section 19 (4) of the Act of that code passed in 1885, Justices at Petty Sessions have no jurisdiction to make an order purporting to correct the plans or maps deposited with a Provisional Order, so as to substitute for a plot actually acquired by a Rural District Council under their compulsory powers another plot which had been selected by their duly appointed sites committee, although the error arises from a *bona fide* mistake made by their engineer.

Held also (diss. Lord O'Brien, L.C.J.), that the owner of the plots was entitled, *ex debito justitiæ*, to a writ of certiorari to quash the order of the Justices.

The decision of the majority of the King's Bench Division affirmed by the Court of Appeal.

MOTION on behalf of the prosecutor, John M'Carthy, to make absolute, notwithstanding cause shown, a conditional order for *certiorari*, dated 30th November, 1909, to bring up to be quashed an order made by the Justices at Ballyvourney Petty Sessions, County Cork, on the 23rd November, 1909. The order of the Justices was as follows :—

“ WHEREAS under and by virtue of the Macroom Rural District Labourers (Unopposed) Order, 1908, a plot of land in the townland of Coolea, in the Electoral Division of Gortnatubrid in the Macroom Rural District, and in said Petty Sessions District of Ballyvourney, and County of Cork, of which John M'Carthy is owner and occupier, was compulsorily acquired by the Macroom Rural District Council for the purposes of the Labourers (Ireland) Acts, 1883 to 1906, and is numbered 178 on Ordnance Sheet

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. No. 69 in the said Order, and on the plans or maps relating
 1910. thereto. And whereas the said plot of land so acquired was
 THE KING by mistake marked on the deposited maps relating to said Order,
 (M'CARTHY) as being on a part of said lands of Coolea different to that
 v. intended at the time the sites included in the said Order were
 JUSTICES OF being marked, on account of a fence on said lands, as appears on
 Co. CORK. said Ordnance Sheet, not being discernible from the public road;
 And whereas the said Macroom Rural District Council this day
 applied for a certificate for the correction of said maps which
 were so marked through omission, error, misstatement, or erroneous
 description :

“ Now we, two Justices of the Peace for the County of Cork,
 assembled at Ballyvourney Petty Sessions this day, having heard
 the application of the said Macroom Rural District Council,
 supported by the evidence of Patrick Coughlan, Civil Engineer,
 and John Casey, Patrick Lynch, John Quille, Edmund Sweeney,
 Daniel Twolig, and proof of service of the required notice having
 been given, and it appearing to us that said omission, error, mis-
 statement, or erroneous description arose from mistake on account
 of a fence on said lands, as appears on said Ordnance Sheet, not
 being discernible from the public road, and that all notices and
 documents required to be served under the Labourers (Ireland)
 Acts, 1883 to 1906, had been served on the said John M'Carthy
 as such owner and occupier, as aforesaid, do hereby certify that
 the site No. 178, coloured red on said Ordnance Sheet No. 69,
 of the County of Cork, and on the said map so deposited, was so
 marked by mistake, through mistake, misstatement, or erroneous
 description, by reason or on account of a fence on said lands as
 appears on said Ordnance Sheet not being discernible from the
 public road, and that the proper site is that No. 178A, coloured
 blue on said Ordnance Sheet No. 69, and we do correct the same
 accordingly. As witness our hands at Ballyvourney Petty
 Sessions this 23rd day of November, 1909.”

Mr. O'Leary, one of the presiding Justices, made an affidavit
 in which he stated that the Bench were of opinion that there
 had been a *bona fide* mistake made by the engineer in mapping
 the plot, and that M'Carthy (the prosecutor) was well aware of
 said mistake.

The other material facts of the case are sufficiently stated in *K. B. Div.* the judgment of Wright, J. :—

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Norwood, for the prosecutor.

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The questions argued were—First, whether the order of the magistrates was made without jurisdiction; secondly, whether the Court had any discretion to refuse *certiorari*; thirdly, was there anything in the conduct of the prosecutor disentitling him to relief.

WRIGHT, J. :—

Feb. 3.

This case has been very fully argued, and we are all of opinion that there is no necessity to let it stand for consideration. The matter in dispute is a very small matter, concerning a plot of land of the value of £11. That was the value put upon it by the Local Government Board arbitrator, and the sum paid by the Rural District Council, and accepted by M'Carthy, the prosecutor here. The present application is to make absolute a conditional order for a writ of *certiorari* to remove for the purpose of being quashed "all and singular orders and adjudications of the said Justices made at Ballyvourney Petty Sessions District of said county on the 23rd day of November, 1909, on the hearing of an application wherein the Macroom District Council were the applicants, and John M'Carthy was respondent, for the correction of the description of the plot of 1A. 0R. 10P. of the lands of Coolea, in the Gortnatubrid Electoral Division of Macroom Rural District, County Cork, acquired by the certificate of order exhibited and fully set out, on the grounds—(1) that the said order of the 23rd November, 1909, is bad in law; (2) that the said order is bad on its face; (3) that said order was made without, and in excess of, jurisdiction; (4) that the magistrates purported to make said order under the Railways Clauses Consolidation Act, 1845, section 7, and that said Act did not apply to the proceedings before the magistrates; and that even if said Act applied, it did not authorize the magistrates to make the said order."

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It appears that in the year 1907 the Rural District Council of Macroom had formulated an improvement scheme under the Labourers (Ireland) Acts, 1883 to 1906. According to the procedure under these Acts, a sites committee, appointed by the Rural District Council, select the sites in conjunction with an engineer, and report to the Rural District Council, who proceed to frame an improvement scheme. Notice must then be served on the owners and occupiers of the lands proposed to be taken, accompanied by a map. In the present case the notice and map were served on the prosecutor on the 13th September, 1907. Undoubtedly the plot of land referred to in that notice and map was the plot marked No. 178 on the Ordnance Sheet No. 69, coloured red. The prosecutor made no objection. An inquiry was held by the Local Government Board Inspector; and a subsequent inquiry was held by the arbitrator, who assessed the compensation payable to the prosecutor at £11. The prosecutor did not attend either of these inquiries. This sum of £11 was paid by the Rural District Council to the prosecutor, who gave a receipt for it, which by the Act of Parliament has all the effect of a conveyance. This receipt, dated the 13th of March, 1909, has a map annexed; and in the body of the receipt the lands are described as follows:—"All that and those that parcel of land in the townland of Coolea, in the Macroom Rural District, and County of Cork, containing one acre and ten perches statute measure, or thereabouts, authorized to be acquired by the Council under the provisions of the Labourers (Ireland) Acts, 1883 to 1906, and distinguished in the schedule to said Order, and on the maps and plans deposited by the Council pursuant to said Acts, by the No. 178 on Ordnance Sheet No. 69, County of Cork, and more particularly shown and described on map given on opposite side hereof."

Therefore, whether by mistake or otherwise, what has been taken by the Rural District Council is a particular plot—the plot marked No. 178 on Ordnance Sheet No. 69. The matter was completed so long ago as March of last year; but it is alleged that subsequently a mistake was discovered—that what the Council intended to take was a plot marked 178A on the same sheet, and coloured blue. Accordingly, the Rural District Council

applied, on notice to the prosecutor, to the magistrates at Bally-vourney Petty Sessions, to correct the alleged mistake; and the magistrates made an order certifying that the site No. 178, coloured red on the Ordnance Sheet No. 69, and map deposited, was so marked by mistake, misstatement, or erroneous description, and that the proper site was No. 178A, coloured blue on said Ordnance Sheet, and they corrected the same accordingly. This is the order now sought to be quashed.

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The application to the magistrates was made under section 7 of the Railways Clauses Act, 1845, as incorporated with the Labourers Acts. The incorporating section is section 19 (4) of the Labourers (Ireland) Act, 1885; and the incorporation is to take effect as if a Provisional Order were the special Act mentioned in section 7, and a board of guardians were the company. The material portion of section 7 of the Act of 1845 is as follows:—"If any omission, misstatement, or erroneous description shall have been made of any lands, or of the owners, lessees, or occupiers of any lands, described on the plans or books of reference mentioned in the special Act, or in the schedule to the special Act, it shall be lawful for the Company, after giving ten days' notice to the owners of the lands affected by such proposed correction, to apply to two Justices for the correction thereof; and if it shall appear to such Justices that such omission, misstatement, or erroneous description arose from mistake, they shall certify the same accordingly, and they shall in such certificate state the particulars of any such omission, and in what respect any such matter shall have been misstated, or erroneously described." The section then provides for the deposit of the certificate with clerks of the peace and postmasters, and proceeds—"And thereupon such plan, book of reference, or schedule, shall be deemed to be corrected according to such certificate; and it shall be lawful for the Company to make the works in accordance with such certificate."

The research of counsel has found one case, and one only, decided on that section, viz., *Kemp v. West End of London and Crystal Palace Co.* (1). The actual decision in that case does not

(1) 1 K. & J. 681.

K. B. Div. affect the present ; but the language and *dicta* of Sir William Page 1910. Wood, V.-C., have a bearing upon it. He considers the section to be intended to apply to mistakes in the nature of clerical errors and the like. But here the application to the magistrates was in substance to tear up the instrument of conveyance of one plot of land which had been purchased and paid for, and to substitute an entirely different plot. In my opinion this does not come at all within the language of the section ; and if there was nothing more in the case, it would be the duty of the Court to make the conditional order absolute.

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But it is said that the granting of the writ of *certiorari* is in the discretion of the Court, and that under the circumstances of this case we ought not to grant it. Very full affidavits have been made on both sides. It is alleged on behalf of the Rural District Council that this was a slip made by their engineer ; that the prosecutor knew from the beginning that it was a slip, and took advantage of it with a view to putting money in his pocket a second time ; to have, according to the expression used in one of the affidavits, “a whack out of the guardians.” The question is, has the prosecutor, by his conduct, precluded himself from obtaining the writ of *certiorari* in the present case.

Now, the order impeached here is an order affecting the prosecutor's property ; effecting a conveyance from him to the District Council of a plot of land different from that sold. It is, undoubtedly, an illegal order, not warranted by the section I have read, or by anything else. Moreover, it is perfectly certain that at the very commencement of the proceedings at Petty Sessions the prosecutor made the objection that is made now, that the magistrates had no power to make the order sought for. I think it is the duty of this Court to relieve him from an order illegally made affecting his property, against the making of which he protested at the proper time.

I am of opinion that the conditional order for the writ of *certiorari* should be made absolute.

. MADDEN, J. :—

I am of the same opinion. As to the application to this case of section 7 of the Railways Clauses Act, 1845, I have nothing to

add to what has been said by my brother Wright. With regard to the conduct of the prosecutor as disentitling him to a writ of *certiorari*, it is important to see exactly the nature of the order under review. It is an order affecting the property of the prosecutor; substituting one piece of the earth's surface for another as the subject-matter of the compulsory acquisition of land. It seems to me to be one of the class of cases in which, according to the decision in *Reg. v. Justices of Surrey* (1), the person aggrieved by an illegal order is entitled to redress *ex debito justitiæ*. I had occasion to consider that authority in the case of the *Queen v. Drury* (2), and I there (p. 525) stated my view of that decision in these words, to which I adhere:—"Reg. v. *Justices of Surrey* (1) has been referred to. Taking the view of the statute which I have mentioned, it is unnecessary to discuss that decision in detail; but I wish to guard myself against misconception. That discussion has not, in my opinion, affected the decisions as to the position of a writ of *certiorari* at common law, nor has it broken down the distinction taken in several cases between the rights at common law of a person coming forward to redress an individual grievance, and of one who comes forward to assert a right in which a more or less numerous class of the public are interested, whether as ratepayers, cesspayers, or otherwise. In the one case it has always been considered that the writ must issue *ex debito justitiæ*, in the same manner as process in a civil proceeding for the assertion of a private right. In the latter class of cases public considerations intervene, and accordingly it has always been held that the issue of the writ is within the discretion of the Court, a discretion to be exercised judicially and not upon capricious grounds."

I am of opinion that the present is a case in which the writ must issue *ex debito justitiæ*, subject to this qualification, that the prosecutor has not by his conduct in the course of the proceedings disentitled himself to apply to this Court for redress. I agree with my brother Wright that in considering this question we are not at liberty to consider the general conduct of M'Carthy relating to the compulsory acquisition of his land by the Rural District

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(1) L. R. 5 Q. B. 466.

(2) [1894] 2 I. R. 489.

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Council. The question is, an order having been made, which in the opinion of my brother Wright and myself is wholly illegal, has the prosecutor by his conduct disentitled himself from having that illegal order, which has deprived him of his land, set aside? The magistrates were not in any way misled by the prosecutor. He appeared before them by his solicitor and protested against the making of what we are now of opinion was an illegal order. So far from doing anything to disentitle him to redress, the prosecutor took the earliest opportunity of protesting against the action of the magistrates. For these reasons I am of opinion that the conditional order for the writ of *certiorari* should be made absolute.

LORD O'BRIEN, L.C.J. :—

I am in the unhappy position of differing from my brethren. Whenever I differ from them, I do so with great reluctance; but in the present case, putting out of consideration the true construction of the words "omission, misstatement, or erroneous description" in the 7th section of the Railways Clauses Act, 1845, I am of opinion that we are not so hide-bound by authority, or by any interpretation of the words "*ex debito justitiæ*," as to be compellable to grant a writ of *certiorari* to enable a course of dishonesty to be persevered in. I refer to Mr. James O'Leary's affidavit for the conclusion the magistrates arrived at. I should be very loath to review their decision in point of fact. They saw and heard the witnesses, but it is only fair to the magistrates to say, that having read all the evidence in the case, all the affidavits that have been made, including the affidavits of the engineer and solicitor for the Rural District Council, I am entirely satisfied that the conclusion arrived at by them as to M'Carthy's state of knowledge throughout, was absolutely right. The money which the applicant received was intended to be given for a plot of land other than that which was actually described. He retains the money, and seeks to prevent what was really intended to be taken from being truly described; and whilst he has in his pocket the money which was in truth and fact the consideration for the purchase of one plot, he tries to get for that one self-same

plot a second consideration, a second price, by being put in a position to have what he calls "a whack out of the guardians." No doubt there was a mistake on the part of the engineer—the applicant, in my opinion, dishonestly endeavours to take advantage of that mistake to keep the money in his pocket in respect of a plot of land which was never intended to be purchased. He tries to prevent the money he has got being made applicable for its true purpose. To adopt the language of Lord Fitz Gerald in the *Listowel Case* (1)—a case often approved of and followed in this Court—he has forfeited by his conduct (persevered in to this present moment), all right to be here. He comes here with unclean hands. It is certainly not an obligation of justice, or a debt due by us to justice, that we should assist him. This is not an attempted substitution of a plot of land not intended to be taken for a plot of land intended to be taken. It is an honest effort to identify what was, in fact, intended to be taken and what McCarthy knew well throughout was intended to be taken. It is said that the applicant has a special grievance, and that we have no discretion in the matter; that we must do what he asks. His grievance is, indeed, of a very special kind; if there be any grievance, it is in truth and fact on the part of the Rural District Council. My brother Madden said more than once that, save for the fact that he thinks the matter amounts to a special private grievance, he would refuse the writ. He says if he had any discretion in the matter he would refuse it. I think we have a discretion; the case touches public authorities, the Rural District Council, and the administration of a public Act of Parliament and local taxation; but, in my opinion, in any view, whether dealing with the case as involving a mere private and personal grievance, or as involving questions of a public nature or a quasi-public nature, I think the application should be refused and with costs.

It is said that the applicant made his objection below; certainly he did; his conduct here and below is quite consistent; whether here or below, that conduct has been characterized by

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(1) I. R. 9 C. L. 46.

K. B. Div. dishonest effort; and, in my opinion, it is a narrow and unsustain-
 1910. able view to take that we cannot, when an applicant appeals to
 THE KING (M'CARTHY) us for a prerogative writ of *certiorari*, regard and probe his
v. conduct at every stage, from the very origin of the transactions
 JUSTICES OF which ultimately led to litigation. A little regard to candour
 CO. CORK. and fair play out of Court would readily solve whatever difficulty
 Lord O'Brien, may now exist.
 L.C.J.

J. G. T.

Appeal. The Rural District Council appealed (1).
 1910.
 April 18, 20. *M'Sweeney*, for the appellants:—

Section 7 of the Railways Clauses Act, 1845 (8 Vict. c. 20), incorporated in the Labourers Act, 1885, gives the Justices power to correct any omission, misstatement, or erroneous description of any lands compulsorily taken; and if such arose from a mistake, they are to certify the same: Bolton's Labourers Acts, p. 96. This procedure was followed in this case, and I submit the magistrates had complete jurisdiction. They found the error arose from mistake. There are no other means provided by the code of rectifying such a mistake. The 7th section of the Railways Clauses Act, 1845, was considered by Lord Hatherley (then Vice-Chancellor) in *Kemp v. West End of London and Crystal Palace Railway Co.* (2). He thought the section was intended to meet the case, *inter alia*, of omission of land in the plan (p. 689). This is what occurred here. There is no question as to what was the plot really selected by the Sites Committee, and the mistake was in marking a wrong plot on the map.

Further, this is a case in which the Court should exercise its judicial discretion by refusing *certiorari*. M'Carthy knew all along of the mistake. Up to *R. v. Justices of Surrey* (3) it was always assumed that the Court had power to exercise discretion,

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 1 K. & J. 681.

(3) L. R. 5 Q. B. 466.

and to consider the conduct of the applicant : *R. v. Committee for South Holland Drainage* (1); *In re Listowel* (2) : *R. (M'Swiggan) v. Justices of Londonderry* (3).

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Norwood, for the prosecutor :—

It cannot be said that there was any fraud on M'Carthy's part. He was under no obligation to give information to the District Council or the Sites Committee. They were acting under compulsory powers, quite independently of anything he might do or say. This is not a case of vendor or purchaser, but of a public body putting in force extensive and arbitrary statutory powers. They have under those powers acquired a plot which was the property of M'Carthy, viz., No. 178, coloured red. That is vested completely in them by the receipt, and cannot be divested. If the magistrates' order stands, they will have two plots, having only paid for one. Section 19 of the Labourers Act, 1885, incorporates section 7 for the correction of accidental mistakes (subsection 4), i.e., mistakes in quantities, boundaries, or names of parties affected. That was Lord Hatherley's opinion in *Kemp's Case* (4). No appeal would lie from the magistrates' order. The remedy, if any, was to petition for an exchange of sites under section 16 of the Labourers Act, 1886.

THE LORD CHANCELLOR :—

April 20.

In this case two questions arise—1st, whether the order purported to be made by Justices on the 13th March, 1909, under the provisions of the 7th section of the Railways Clauses Act, 1845, which was incorporated with the Labourers Act, 1885, was an order lawfully made? 2nd, whether the prosecutor, John M'Carthy, was disqualified by any conduct of his from applying for and obtaining a writ of *certiorari*?

On the 30th September, 1907, the Rural District Council of Macroem formulated a scheme for the erection of labourers' cottages, and amongst them was one identified on the Ordnance

(1) 8 A. & E. 429.

(3) [1905] 2 I. R. 318.

(2) I. R. 9 C. L. 46.

(4) 1 K. & J. 681.

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map as No. 178, containing 1A. 0R. 10P. There was an inspection of sites, and a Provisional Order was made on 26th May, 1908.

The case alleged is that the site 178, marked on the map, and coloured red, was not that in fact intended to be bought, which was another, 178A, coloured blue, and that the engineer of the Rural District Council made a blunder in numbering the sites. The arbitrator inspected the sites, including the real one, and awarded to M'Carthy £11 as purchase-money, which M'Carthy accepted; and on the 13th March, 1909, he gave a statutory receipt for this to the Rural District Council, as the purchase-money of 178, described clearly in the receipt, and identified by reference to the number on the map and Ordnance Sheet. It will be seen that M'Carthy's lands were being compulsorily taken. He did not originate any blunder, and whether the plot was 178 or 178A was a question in which he had neither voice nor power.

The effect of the receipt of 13th March was under the Labourers Act of 1906, section 11, to vest absolutely in the Rural District Council the site 178 mentioned in it, and the transaction ended between them and M'Carthy as vendor and purchaser. M'Carthy ceased to be owner of 178, and the Rural District Council acquired it. When the Council came to build on site 178 so acquired, it was found that their engineer had marked on the map the wrong plot. M'Carthy naturally objected to building on 178A, and the mistake was then sought to be remedied, and the right site got, by an application to Justices on the 23rd November, 1909; and they made an order against the protest of M'Carthy [His Lordship read the order, *ante*, pp. 421, 422], and under that order it is contended that the site 178A became vested in the Rural District Council, and divested out of John M'Carthy, instead of the site 178 already conveyed to them by virtue of the statutory receipt of 13th March, 1909. This is said to be by virtue of the 7th section of the Railways Clauses Act, 1845, given at p. 96 of Bolton on the Labourers Acts. [His Lordship read the section.] In my opinion that section does not apply at all. It certainly does not apply after the conveyance is made (1).

'Take the case of a railway. Could new lands be substituted

(1) *Kemp's Case*, 1 K. & J. 681.

after deed-poll made, and a title given wholly distinct from that already in the Company by statute. There was no difference of opinion amongst the Judges in the King's Bench Division on this point, as the Lord Chief Justice expressed no opinion.

As regards the second question, whether John M'Carthy was disqualified by any conduct of his from applying for this writ, I think he has not been fairly treated by the allegation that he was guilty of fraud. His lands were being taken from him compulsorily, and at a price to which he was no party, and he had a perfect right to sit still. There is evidence of a rather loose character tending to show that he knew the Rural District Council were under the impression they were acquiring 178A. But all the material statements are denied by M'Carthy. The mistakes were all theirs; he did not originate them, and the documents are all in his favour. He protested against the building on the 178A site, and he challenged the jurisdiction of the magistrates at the Petty Sessions. [His Lordship read passages from the judgment of Wright, J., on this point.]

How could he let this order affecting his title remain? It affected his rights and property, and it seems to me it is *ex debito justitiæ* to challenge it.

He does not get back No. 178 while it remains. It is absurd to suppose the order of the Justices would have the same effect as the statutory receipt, and revest 178.

I think we must affirm the decision of the King's Bench Division.

HOLMES, L.J.:—

These proceedings have been taken by the prosecutor for the purpose of quashing a certificate of Justices which he alleges was made without jurisdiction, and which if allowed to stand might be regarded as a blot on the title to lands of which he is occupier. The impeached certificate was made on the application of the Macroom Rural District Council, and was the sequel of proceedings taken by that body for the purpose of acquiring lands compulsorily, pursuant to the provisions of the Labourers (Ireland) Acts. The Council having resolved to promote an improvement scheme under these statutes, and sites for

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the intended cottages having been duly selected, caused the notices with maps attached, as prescribed by the Labourers (Ireland) Order, 1906, to be served on the owners and occupiers of such sites, including a notice on John M'Carthy, the occupier of a plot of ground, about an acre in extent, marked No. 178, and coloured red on the accompanying map. He was thus served on the 13th September, 1907; and a Provisional Order authorizing the scheme was made on the 26th May, 1908. This was followed on the 17th December, 1908, by the arbitrator's award, giving £11 to M'Carthy for his interest in the plot aforesaid, and on payment of this amount, he gave his receipt therefor on the 13th March, 1909.

The maps incorporated with the Provisional Order, award, and receipt were identical with that attached to the notice; and there is no doubt that the effect of the receipt was to convey to the District Council all the interest of M'Carthy in the plot of ground described in those maps as No. 178, and coloured red. Up to this point there was no controversy as to the site sought to be acquired by the Council; but subsequently, when possession was about to be taken with a view to the erection of a labourer's cottage, the Council claimed that the plot of M'Carthy's land to which the several documents related was not that marked on the maps as No. 178, but an acre of land adjoining. Upon this being disputed by M'Carthy, the Council applied to the Justices of the Petty Sessions district for a certificate correcting the description of the plot acquired. I have not been supplied with either a notice of this application or of the order made thereon; but inasmuch as the only authority under which such a certificate could have been given is section 7 of the Railways Clauses Consolidation Act, 1845, incorporated with the Labourers (Ireland) Acts, 1883 and 1885, I assume that it followed the language of that enactment, which provides that if any omission, misstatement, or erroneous description shall have been made of any lands described on the plans or books of reference mentioned in the special Act, or in the schedule thereto, it shall be lawful for the Company to apply to two Justices for the correction thereof; and if it shall appear to such Justices that such omission, misstatement, or erroneous description arose from mistake, they shall certify the

same accordingly with the particulars thereof, which certificate is to be deposited as therein provided, and thereupon such plans, books of reference, or schedules shall be deemed to be corrected according to such certificate, and it shall be lawful for the Company to make the works in accordance therewith.

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Although this provision was enacted more than sixty years ago, it is only referred to in one reported case: *Kemp v. West End of London and Crystal Palace Railway Company* (1); and it seems to me that it can only apply where there is neither doubt nor controversy as to the identity of the lands described on the plans or books of reference, but where there is some omission or error in describing them. To hold otherwise would lead to the extraordinary anomaly that while it requires a statute to authorize the compulsory acquisition of the lands specified therein, two Justices could substitute therefor other lands situated in a different locality, and possibly belonging to a different owner. But if this is not the true construction, I am satisfied that the certificate must be given after the statute or Provisional Order, and before any steps are taken to put in force the compulsory powers thereby conferred. The correction is confined to the plans, books of reference, or schedule, and does not affect an award already made, or a conveyance or its equivalent already completed. For this reason, I have no doubt that the adjudication of the Justices was without jurisdiction; and, inasmuch as the object of obtaining it was to transfer to the Council a piece of the relator's land to which they were not entitled, the case is one of the class in which the party aggrieved is entitled to the writ of *certiorari ex debito justitiæ*. It is not material to consider whether the certificate would have any legal effect. As long as it stands, it is a blot on M'Carthy's title, and may be used to involve him in further litigation.

It is, however, argued that he is disqualified by his own fraud from obtaining the relief asked for. I may say at once that I find no evidence of fraud or misconduct, legal or moral, on the part of M'Carthy.

It is said that the committee of selection fixed on the site now

(1) 1 K. & J. 681.

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claimed by the Council, and that it was by the engineer's mistake that a different site appeared in all the maps, but that the arbitrator did not value the plot thus inserted in error, but the true site. There is, however, no evidence that M'Carthy had anything to do with the selection of the site, with the action of the engineer or of the arbitrator, or with the preparation of the receipt by the solicitor of the Council. Neither directly nor indirectly was he responsible for the mistake, if mistake there was. I assume that at some time after the service of the notice on him, and before the payment of the £11, he became aware that the Council erroneously believed that they were seeking to acquire a different and more valuable piece of his land than what appeared in the maps, but what obligation was he under to keep a public body right in point of fact or point of law? He did not agree to sell any of his land. The Council was seeking to acquire a portion of it against his will; and he remained perfectly passive while the legal steps were in progress. The result is that there is now vested in the Council an acre of M'Carthy's farm; and why he should be charged with fraud because he declines to give them an additional acre to which they are not entitled, I fail to see. From the moment the point was raised, he disputed the claim of the Council and resisted the application to the Justices. His contention was right, and, therefore, I hold that the appeal must be dismissed with costs.

CHERRY, L.J.:—

On the main question in this case, namely, the jurisdiction of the magistrates to make the order under section 7 of the Railways Clauses Consolidation Act, 1845 (incorporated with the Labourers Acts), I entirely concur in the judgments of Madden and Wright, JJ., in the Court below; and I think that their interpretation of the judgment of Page Wood, V.-C., in *Kemp v. West End of London and Crystal Palace Railway Co.* (1) is also correct. The section, as they point out, gives jurisdiction to correct errors in the "plans or books of reference," or in the "schedule to the special Act" only. It confers no power to alter or amend a conveyance. That being so, it appears to me that the powers can

(1) 1 K. & J. 681.

only be exercised before the lands are vested in the company (or, under the Labourers Acts, in the District Council). If this were not so, endless confusion would arise. Power would be conferred to acquire one plot of land, when another had actually become vested in the District Council. It is admitted that in this case plot 178 has become vested in the District Council by virtue of the receipt given by M'Carthy for the purchase-money. Under the order of the magistrates they claim to be entitled to take possession of plot 178 A as well. Are they to hold both plots? And if not, how is M'Carthy to get back plot 178, which has been actually taken from him by compulsion, and is now in the ownership of the District Council?

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Apart altogether from this difficulty, there is another, in my opinion, as serious, in the way of the District Council. The section under which the order of the magistrates was made applies only to "omissions," "misstatements," or "erroneous descriptions," of any land, in some document. Now, there is no omission, misstatement, or erroneous description of any land in any document in this case. Plot 178 is clearly and correctly described in all the maps and plans. The magistrates were asked to correct, not an error in a document, but a mistake of an engineer and an arbitrator in the identification of a particular plot of land—a mistake, I may say, of a very inexcusable character on their part. I do not think that there is any power to correct such an error as this. The section, in my opinion, applies where the right lands are intended to be described, but there is some error or omission in the description of them; but I do not think it applies where different lands are intended to be described, and these are accurately and correctly specified in the maps, notices, and other documents. The section is meant to give power to correct an error of description or delineation, not to enable one plot of land to be substituted for another. I am therefore of opinion that the order of the magistrates in this case was entirely without jurisdiction, and utterly ineffectual for the purpose for which it was intended.

Why, then, should not a writ of *certiorari* issue? Two reasons are suggested why the Court should refuse leave for its issue, even assuming that the order of the magistrates was bad. In the first

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place, it is said that the order, if made without jurisdiction, will do no harm. But it will do a great deal of harm. It throws doubt upon the prosecutor's title to his land. It makes everything uncertain as regards the plot actually and legally acquired. Even in the interest of the District Council itself, I think it would be a lamentable thing to allow this illegal order to remain standing, as it would cast the same shadow of doubt upon their title to the red plot as upon M'Carthy's title to the blue.

In the second place, it is said that the granting of the writ is a matter of discretion, that it is not *ex debito justitiæ*, and that the prosecutor has been guilty of conduct which disentitles him to relief in the present instance. Even assuming that the granting of the writ is discretionary, what has M'Carthy done that disentitles him to have this blot on his title to his land removed? It is said that he knew of the mistake made by the engineer and arbitrator, and did not mention it to the Council. But was he under any obligation to call their attention to it? I entirely agree with the remarks of Holmes, L.J., that a man whose property is being taken compulsorily, and against his will, is not under any obligation to correct errors made by officials who are carrying out the compulsory acquisition, especially when he is put at arm's length, as M'Carthy was by the District Council in this case.

Again, I do not think that it has been satisfactorily proved that he did know of the mistake. The only evidence of this is the affidavit of a labourer named Quille, who says that he had a conversation with M'Carthy upon a date which he does not fix, in which M'Carthy informed him "that the arbitrator had been on his lands, and had dug with a spade a hole on portion of the plot thereof, No. 178A, coloured blue on said Ordnance sheet No. 69." I may remark, in passing, that the language alleged to have been used in this conversation by M'Carthy has a legal smack about it, very unlike what one would expect from a farmer in his position. I do not think that it can represent the actual words used. This tends, to my mind, to support M'Carthy's positive denial that there was any such conversation. Even if it did take place, it really proves nothing, except that he knew that there was a hole dug by somebody in a particular field. M'Carthy, on the other hand, swears positively that he never knew that it was intended to take

the plot which the District Council now seeks to acquire. He says that the sites committee never went on the land at all—that they stood on the public road, and told him that they would take his land in spite of him; and he adds—"I did not know at that time what site had been selected, and I did not concern myself about the matter until I was served with the map on the 13th day of September, 1907, showing the plot sought to be acquired, coloured red, and numbered 178. I had no objection to this site, and I did not appear at Macroom at the local inquiry before the Local Government Board Inspector to object to same. I was not present" (he adds) "when the Inspector and Mr. Coughlan came out to inspect the site, and neither was I present when the arbitrator who fixed the value came out, and I got no notice whatsoever that they would attend on the lands."

Under these circumstances, I cannot see that he has done anything to deprive himself of the *prima facie* right which everyone has to have an illegal order seriously affecting his property set aside.

Solicitor for the prosecutor: *Thomas P. Grainger.*

Solicitor for the Macroom Rural District Council: *Michael Purcell.*

W. G

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P. was awarded an old age pension by a local pension committee at the rate of 2s. a week, and no appeal was taken from this award to the central pension authority. P. subsequently wrote to the local pension committee a letter purporting to raise a "question" as to the rate of his pension, and claiming 5s. a week in lieu of 2s., but not alleging any change in his circumstances, no such change having, in fact, occurred. The local pension committee having refused to increase the amount of P.'s pension, the latter appealed to the central pension authority, who, on the alleged grounds that P.'s means were such as not to entitle him to any pension, decided accordingly that he was not so entitled. The King's Bench Division (Palles, C.B., and Johnson, J.) were unable to agree as to whether P. was entitled to a writ of *certiorari* to quash this decision.

Held, by the Court of Appeal, affirming the view taken by Palles, C.B., that the original decision of the local pension committee, not having been referred to the central pension authority, was final and conclusive, under section 7 (2) of the Old Age Pensions Act, 1908, and that accordingly the order of the central pension authority depriving P. of his pension was made without jurisdiction, and should be quashed.

William Pawley, whose sole means of support consisted of a farm of $8\frac{3}{4}$ acres of land which he had purchased under the Land Purchase Acts, and held subject to an annuity of £6 13s. per annum, duly applied for an old age pension in the month of October, 1908. His claim having been investigated by the pension officer, Pawley was, on the 24th November, 1908, awarded by the local pension committee a pension of 2s. a week, and, no appeal having been taken to the central pension authority, a

(1) In the King's Bench Division, before PALLES, C.B., and JOHNSON, J.

pension at this rate was paid to Pawley from the 1st January to the 7th May, 1909. K. B. Div.
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On the 10th March, 1909, Pawley, being dissatisfied with the amount of his pension, wrote a letter to the local pension committee, claiming to be entitled to a pension at the rate of 5s. and not 2s. a week, on the ground that the profits of his farm had been wrongly estimated. On the 30th March, 1909, the local pension committee decided that Pawley was entitled to a pension at the rate of 2s. a week only, whereupon Pawley appealed to the Local Government Board. The latter body, on the 4th May, 1909, determined that "the above-named William Pawley is not entitled to any pension," the grounds for this decision being stated, in a subsequent correspondence between the Local Government Board and Pawley's solicitors, to be, because, on consideration of the facts submitted to them, they found the claimant's means exceeded the limit prescribed by section 2 (3) of the Act.

Pawley, on the 2nd June, 1909, applied to, and obtained from, the King's Bench Division a conditional order for a writ of *certiorari* to remove into the said Division for the purpose of being quashed the said order of the Local Government Board of the 4th May, 1909, determining that Pawley was not entitled to any pension, and now applied to have the said order made absolute.

J. C. Davidson, for the prosecutor :—

Ronan, K.C., Chambers, K.C., and W. E. Wylie, for the Local Government Board.

JOHNSON, J. :—

W. Pawley, who describes himself as a farmer, in his affidavit of 1st June, 1909, sworn by him as a marksman, applied in due form for a pension under the Act to provide for old age pensions (8 Edw. 7, c. 40), and was awarded by the Local Pension Committee a pension of 2s. per week, the statutory provision for an old person whose yearly means exceed £26 5s., but do not exceed £28 17s. 6d., and this pension was paid to him from 1st January, 1909, to 7th May, 1909. This decision of the local pension committee not being appealed from, was by section 7 (2) "final and conclusive": that is subject to the other provisions of the Act. In

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K. B. Div. March, 1909, Pawley sent a letter to the pension officer, claiming 1909. (as a person whose yearly means did not exceed £21) a pension of 5s. per week, instead of his existing pension of 2s. per. week. THE KING (PAWLEY) v. The local pension committee decided against Pawley, who then Loc. Govt. Board. duly appealed to the Local Government Board, the central pension authority under s. 7 (1) (d). That section (1) provides that "all claims for old age pensions under this Act, and all questions whether the statutory conditions are fulfilled in the case of any person claiming such a pension, or whether those conditions continue to be fulfilled in the case of a person in receipt of such a pension, or whether a person is disqualified for receiving, or continuing to receive, a pension, shall be considered and determined as follows." And then follow sub-sections (a), (b), (c), and (d) under which Pawley appealed from the decision of the local pension authority, notified to him by their clerk as follows: "You are hereby informed that by their decision, 30th March, 1909, the Armagh Rural, North, sub-committee of the local pension committee of the county Armagh have decided the question, whether you are entitled to a pension at the weekly rate of 5s., instead of the weekly rate of 2s., as follows: you are entitled to a pension at the weekly rate of 2s. only." From that decision Pawley appealed to the Local Government Board, the central authority, who duly investigated his claim, and in the course of their investigation "*found*" that Pawley "had been in receipt of an old age pension under the Act while the statutory conditions were not fulfilled in his case," and on the 4th May, 1909, determined that Pawley was not entitled to any pension. A correspondence then took place between Pawley's solicitor and the Local Government Board, who by their secretary informed Pawley's solicitor that the Local Government Board found Pawley's means exceeded the limit prescribed by the Act (£31 10s.). Having thus not only failed in obtaining a pension of 5s., but having also been "*found*" in receipt of an old age pension to which he had no legal or moral right, Pawley now applies to this Court for a writ of *certiorari* to quash the adjudication of the Local Government Board, on the ground that the question on which he appealed from their decision was, whether or not he was entitled to a pension of 5s. per week, instead of his pension of 2s. per week, and, therefore, the Local Government

Board had no jurisdiction to decide that he was not a person within the Act, and not entitled to any pension under the Act. The local authority gave him a pension of 2s. a week, believing him to be a person entitled to receive that pension under the Act; but the provision in section 7 (2), that the decision of the local authority on any claim or question not referred to the central authority shall be final and conclusive, is obviously not to be read or taken absolutely: it is subject to all the other provisions of the whole Act, *e.g.* variation of income, &c., and it would be a singular construction of the statute providing for old age pensions, that a person "*found*" by competent authority, on the proper investigation of a claim by him, to be in receipt of a pension while the statutory conditions were not fulfilled in his case, should nevertheless be judicially declared entitled to continue to draw such pension under the Act, as a person entitled to it. The statute section 9 (2) provides that "*if it is found at any time that a person has been in receipt of an old age pension under this Act while the statutory conditions were not fulfilled in his case . . . he or, in the case of his death, his personal representative shall be liable to repay to the Treasury any sums paid to him in respect of the pension while the statutory conditions were not fulfilled.*" This is what was "*found*" in Pawley's Case in an investigation, at his instance, into his claim for a larger instead of the smaller pension which he was receiving as a lawful object of the Act, which he was not. The payment of any pension to him was therefore absolutely unlawful and unwarranted, notwithstanding section 7, which is subject to all the other provisions of the Act, and the Local Government Board, on thus having *found* what the fact was, were, I think, not only justified but were bound to decide, on his claim to a higher pension, that he was not entitled to any pension whatever.

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Johnson, J.

PALLES, C.B.:—

The question which has been argued here is a far-reaching one. I have given it all the consideration in my power; and in result I am unable to agree in the conclusion at which my learned brother has arrived.

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I am of opinion that, having regard to the express provision in section 7, sub-section 2, of the Old Age Pensions Act (1), the decision of the local pension committee on the prosecutor's claim was final and conclusive in all proceedings under the Act that the "statutory conditions" were fulfilled by the prosecutor *at the time of that decision*; that the central pension authority had no jurisdiction, *otherwise than on appeal* from that decision of the local pension committee, to decide that the prosecutor did not, *at that time*, fulfil those conditions; that such central authority was consequently without jurisdiction, on their consideration of the subsequent so-called "question," to make the order now sought to be brought up, and consequently that that order is void and ought to be quashed.

Before referring to the sections of the Act upon the construction of which the question depends, it is right to mention a matter which, rightly, was not argued, and which I refer to only for the purpose of putting it out of consideration. It is that, by the decision of the local committee, the prosecutor's claim to a pension was only "provisionally" allowed. In the notice to the prosecutor of this decision, the following note is attached to this word "provisionally":—

"The words in brackets" (which include this word 'provisionally') "are only to be retained where the claimant is not immediately entitled to the pension, and in such cases the date on which he will become entitled to a pension should be inserted."

This note, and the provisions of section 10, sub-section 2, and section 12, sub-section 1, appear to me to show that the word "provisionally" means provisionally upon the pensioner living until the date in the first week in January, 1909, at which the first weekly gale of the pension was payable under the statute. As all parties appear to agree upon this, it is not necessary that I should further elaborate it.

Section 1, (1) and (2), of the Act entitle every person in whose case the statutory conditions are fulfilled to receive a pension at the rate mentioned in the schedule, so long as the conditions continue to be fulfilled, and so long as he is not disqualified under

the Act for the receipt of the pension. The rate mentioned in the schedule depends on the yearly means of the pensioner, as calculated in the mode prescribed by section 4, and consequently may vary from year to year. Thus, the pension to which a right is in this section conferred upon the pensioner is not only one which may be determinable, but one which during its continuance may vary from year to year.

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Sections 2, 3, 5, 6, and 9 of the statute are explanatory of section 1, and define the nature and amount of pension. Of these, section 2 prescribes the statutory conditions on which it is to be held; section 3, the disqualifications; section 4, the mode of calculating its amount; section 5, the mode of payment; and section 6 renders it inalienable.

Section 9 consists of two sub-sections. Of these, the first constitutes it an offence, punishable summarily, for any person knowingly to make a false statement for the purpose of obtaining or continuing a pension under the Act, or for obtaining or continuing it at a higher rate than is appropriate to the case; and the second renders any sums paid whilst the statutory conditions are not fulfilled, or while the pensioner is disqualified from receiving it, debts due by the pensioner to the Crown, recoverable from him or his personal representative. As to each of these sub-sections, I have to observe that the proceedings mentioned therein are not proceedings under the Act to ascertain the amount of a pension; and that, in them, the conclusive character given by section 7, sub-section 2, to the decision of the local pension committee does not apply. These are, substantially, the only sections which deal with matters of right.

Matters of procedure are dealt with by, *inter alia*, sections 7 and 10. Section 7, which is that which confers the jurisdiction under which the "local pension committee" acted, and the "central pension authority" purported to act, in relation to the prosecutor's pension, is of supreme importance. It is to a slight extent complicated by reason of its brevity, combining, as it does, in the same sentence, the jurisdiction upon appeals from decisions of local pension authorities, whether those decisions be in respect of claims or of what the Act styles "questions," which are different in their nature from claims. It is, however, sufficient to

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say that the decision in question here was upon an appeal from a decision, not upon a "claim," but upon a "question"; and that there had been a previous decision upon the claim—a decision which, by sub-section 2 of this section, is declared to be "final and conclusive."

Thus the only jurisdiction in the central pension authority was its jurisdiction upon an appeal from a decision on a "question"; and consequently we must see what are the matters which the Act styles "questions," and what is the extent of the jurisdiction involved in the determination of a "question," when there has been a previous final and conclusive decision allowing a pension.

Now, the section enumerates three, and only three, classes of matters which it styles "questions"; and these three classes are the only matters which the pension authorities are empowered to consider and determine, in addition to "claims."

These three classes are described in the following words:— all questions (1) whether the statutory conditions *are fulfilled*, in the case of any person *claiming* such a pension; (2) whether those conditions *continue to be fulfilled* by a person in receipt of such a pension; (3) whether a person is disqualified for receiving, or continuing to receive, a pension.

This section, 7, enacts that any *such* question shall stand referred to the Local Pension Committee; that the committee shall (except in the case of a question which has been originated by the pension officer, and on which they have already received his report) refer it for report and inquiry to the pension officer; and on receipt of his report, and after obtaining, if necessary, further information, consider the case, and give their decision upon the "question."

By sub-section (c) of this section an appeal to the central pension authority is given to, *inter alios*, the pension officer, against the decision of the local pension committee *determining any question*, and an appeal so brought stands "referred to the central pension authority, and shall be considered and determined by them."

The question in the present case was put by a person who appears upon the paper by which the question was originated to be, and who in fact was, in receipt of such a pension. [The

Lord Chief Baron read the substance of the paper.] The only jurisdiction of the central pension authority was to consider and determine "whether the conditions *continued* to be fulfilled."

Reverting now to the subject-matter of questions under section 7, in respect of the fulfilment of statutory conditions, it will be found that it varies, according as the case is one of a person "claiming such a pension," or "in receipt of such a pension." The question which the prosecutor originated here, having regard to the statements in the paper which I have read, is one by a person "in receipt of such a pension"; and therefore the only matter open for consideration was, not whether the statutory conditions were fulfilled by him *at the time of the decision of the claim*; but, assuming that they were then fulfilled, whether they continued to be fulfilled by him. This treats as final and conclusive the previous decision, that at the time it was made those conditions were fulfilled; and leaves open only the question, have they, by matter subsequent, ceased to be fulfilled? That they had so ceased is not shown on the face of the proceedings, nor even by affidavit in the matter.

Consequently, I am of opinion that the order of the Local Government Board was made without jurisdiction, and that it ought to be brought up to be quashed; but as my brother Johnson thinks differently, the ordinary rule must prevail, and the application must be refused.

As the Court is equally divided, there is no power to give costs.

J. G. T.

The prosecutor appealed (1).

J. C. Davidson, for the appellant:—

Once the local pension committee have decided that Pawley was entitled to a pension at the rate of 2s. a week, their decision, not having been appealed against, became final and conclusive under section 7, sub-section 2, of the Old Age Pensions Act, 1908;

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and the Local Government Board, accordingly, had no jurisdiction to deprive Pawley of his pension. Such an order could only have been made by them on the matter being brought before them for the determination of a question as defined by the provisions of the Act, and on evidence of change of circumstances disentitling Pawley to a pension, and no such change has been suggested. No doubt, the question as to the rate of his pension was raised by the pensioner himself, but that did not confer jurisdiction upon either the local pension committee or the central pension authority to inquire into matters which had already been finally and conclusively determined by the decision of the local pension committee, which remained unappealed against. The letter from Pawley to the local pension committee did not formulate a "question" within section 7 (1) of the Act, and, assuming that it could be held to have done so, the Local Government Board did not answer the "question," which alone they would have had power to do, but simply deprived Pawley of his pension.

Chambers, K.C., and W. E. Wylie (with them Ronan, K.C.),
for the respondents :—

We contend that the Local Government Board had full jurisdiction to deprive Pawley of his pension. The provisions of section 7 of the Act itself, and of section 9 (1) and (2), show that it was not the intention of the Legislature that the decision of a local pension committee on any claim or question not referred to the central pension authority should be final and conclusive for all purposes whatsoever. Here the "question" raised by Pawley himself was in effect a net claim for a pension at the rate of 5s. a week, and this claim re-opened the entire matter. All finality with regard to the former decision of the local pension committee was got rid of, and when the matter came before the Local Government Board as the central pension authority on appeal, that body was bound to refuse any pension if the applicant was not, on the information before them, entitled to it. The means of the applicant were not the only matter to be considered in determining his right to a pension; the statutory conditions and disqualifications prescribed by sections 2 and 3 of the Act have also to be considered, and the appellant must go to the length of arguing that no matter

what mistake was made in the matter of these conditions, *e.g.*, as to the age of the applicant, by the local pension committee, their decision, when not appealed against, became final and conclusive, and could not be afterwards set right. The words in section 7 (1), "or whether those conditions continue to be fulfilled," are not limited to matters subsequent to the awarding of the pension, and once the matter is properly re-opened the duty of the body having power to inquire into it is not to start with the finding of the original tribunal, but to see whether or not the prescribed conditions are fulfilled.

Davidson, in reply.

THE LORD CHANCELLOR :—

Dec. 13.

This case raises the question whether a decision of the Local Government Board, dated 4th May, 1909, purporting to be made under the Old Age Pensions Act, 1908, whereby they determined that Pawley was not entitled to any pension under that Act, was made without jurisdiction, and should be brought up by writ of *certiorari* for the purpose of being quashed.

The Lord Chief Baron was of opinion that the order was made without jurisdiction, and should be quashed, but Mr. Justice Johnson was of a different opinion, and, consequently, the application of the prosecutor, Pawley, stood refused.

The case, I think, depends on the application of the provision in section 7 of the Act, sub-section 2, to the facts of the case.

William Pawley made a claim for a pension on the 10th October, 1908. The pension officer on the 9th November, 1908, made a report to the local pension committee that he had investigated the claim, and that Pawley would be entitled to a pension of 2s. weekly from the 1st January, 1909, and the local pension committee on the 24th November, 1908, decided that Pawley was entitled to a pension of 2s. per week, commencing from 1st January, 1909.

This was based on the estimate of his means by reference to the schedule to the Act, viz., that they exceeded £26 5s. per annum, but did not exceed £28 17s. 6d. There was no appeal to the central pension authority, and he was paid 2s. per week up

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to 7th May, 1909. William Pawley, on the 10th March, made the following application to the pension officer:—"I desire to raise the following question in reference to my pension, viz., that I am entitled to a weekly pension at the rate of 5s. instead of at the rate of 2s.," and he then sets forth reasons showing, as he alleged, that his means had been over-estimated; but he does not allege that there was any change in his circumstances since the decision of the local pension committee, or that any new facts had come to his knowledge.

The local pension committee, however, adhered to their former decision, and on the 30th March decided that the rate of 2s. per week should remain unaltered.

Pawley then, on the 1st April, appealed to the Local Government Board, on the ground as stated that his means were not as large as estimated; but no change in his circumstances is suggested, nor the existence of any new facts, nor any additional evidence. On the 4th May the Local Government Board made the following decision:—"It is determined that the above-named William Pawley is not entitled to any pension."

The question which we have to consider is, whether that decision was made without jurisdiction. I am of opinion there was no jurisdiction to make it.

It was one plainly open to *certiorari*, as it was made in alleged discharge of a judicial function given to them, and it deprived Pawley of his pension, and therefore affected his right.

I think the local pension committee had no power to reconsider the decision already made by them on the 24th November, 1908, and the Local Government Board should have declined to entertain the appeal on the ground that the previous decision, which had not been appealed against, was final and conclusive, and their decision depriving Pawley of his pension on the same facts as existed on the 24th November, and without any allegation of new facts or new evidence, was made without jurisdiction, and should be quashed.

Section 7, sub-section 2, expressly enacts that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority, and the decision of the central pension authority on any claim or question which is

so referred to them shall be final and conclusive." Here there was a claim made to the local pension committee. It was decided upon without being referred to the central pension authority, and the case comes literally within the first branch of sub-section 2.

I express no opinion on the question whether there might not be a case in which an order granting or refusing a pension might not be reconsidered, though no change of circumstances was shown to have originated after the date of the order.

On the facts here, which are all admitted and common facts, no such case arises. I am, therefore, of opinion that the decision of the Chief Baron was in result right. I do not think that section 9, sub-section 2, has any application to such a case as the present.

The appellant has brought all this difficulty on himself by originating and prosecuting an appeal which there was no jurisdiction to bring or have decided. It is, consequently, not a case for giving him any costs.

HOLMES, L.J. :—

I am satisfied that the order made by the Local Government Board, sought to be removed by writ of *certiorari* into the King's Bench Division, was without jurisdiction ; and that, therefore, the conditional order for its removal ought to be made absolute for the purpose of having it quashed.

William Pawley claimed an old age pension, and it was necessary for him to show that he fulfilled the conditions prescribed by the Act of 1908. One of these conditions was that he should satisfy the pension authorities that his yearly means, as calculated under the Act, did not exceed £31 10s. Assuming that his means did not exceed this sum, and that he fulfilled the other conditions, the amount of the pension to which he was entitled is that prescribed by section 1 and the schedule to the Act. The only question that seems to have arisen when the application was made was as to the amount of the pension, which is made dependent upon his yearly income, consisting, as is admitted, solely of the profits derived by him from a small farm of which he had been tenant, but which he had purchased under the provisions of the Ashbourne Act. His claim was duly reported on by the pension officer, and considered by the local pension committee, which

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ascertained that his yearly means, while exceeding £26 5s., did not exceed £28 17s. 6d. Accordingly it decided, pursuant to the schedule, that he was entitled to a pension at the rate of 2s. per week.

No appeal was taken from this decision to the central pension authority—that is, the Local Government Board—whereupon, under section 7 (2) of the Act, the decision became final and conclusive; and he was paid a pension at this rate from and after the first January last.

In the following March, Pawley was advised to raise the question that his weekly pension ought to be 5s. and not 2s., whereupon he addressed a letter to the pension officer, giving reasons in support of this claim. It appears from this document not only that there had been no change of circumstances since the decision of the local pension committee, but also that all the facts relied on were within Pawley's knowledge when he first claimed. In these circumstances, I am of opinion that the committee had no jurisdiction to reconsider their previous decision. They appear, however, to have done so; and on the 30th March they once more decided that Pawley was entitled to a pension at the weekly rate of 2s. only.

From this adjudication he appealed to the Local Government Board, whose duty was, on ascertaining that there was neither change of circumstances nor additional evidence, to decline to proceed with the appeal, on the ground that it had no jurisdiction to alter the previous decision. Instead, however, of taking this course, it reconsidered once more the original claim, and held that Pawley's yearly means exceeded £31 10s., and that he was, therefore, not entitled to any pension.

I am satisfied that this order was without jurisdiction; and as it purported to be made in the exercise of the judicial function conferred by the statute on the Board, and would, or at least might, prejudice Pawley's rights, it ought to be quashed by means of the writ of *certiorari*. I notice that the Lord Chief Baron, in coming to the same conclusion, seems to have been of opinion that there can be no reconsideration of an order granting or refusing a pension, unless it can be shown that there has been a change of circumstances after the order has been made. I desire to say that I do not go so far as this. I am disposed to think

that either the claimant or the pension officer is at liberty to reopen the matter, not only where there has been a subsequent change of circumstances, but where one or other of them has subsequently ascertained the existence of relevant facts, or evidence of such facts, previously unknown to him. This is an important question which it is not necessary to decide in this case and as to which I shall keep my mind open, if it arises hereafter; but I have referred to it, to prevent it being thought that it is involved in my decision of this appeal.

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CHERRY, L.J. :—

In this case an important question has been raised as to the power of the Local Government Board (which is the central authority under the Old Age Pensions Act, 1908) to deprive of his pension, otherwise than upon an appeal in the manner provided by the Act, a person to whom an old age pension has been duly awarded by the local pension committee, where there has been no change in the circumstances of the pensioner, and no suggestion of any fraud or mistake upon his part, in the original statement of his means.

The facts of the case are shortly as follows—William Pawley of Canary, in the county of Armagh, in the month of October, 1908, duly applied for an old age pension through the local postmaster. His sole means of support consisted of a small farm of eight and three quarter acres of land, which he had purchased under the Land Purchase Acts, and held subject to an annuity of £6 13s. per annum. His claim was duly investigated by the local pension authority, which estimated his means under section 4 of the Act, as amounting to £27 12s. a year, and he was, accordingly, awarded a pension of 2s. a week, being the proper amount for such an income under the schedule to the Act. This award was made on the 24th November, 1908. No appeal was taken from it to the central authority. A book of orders was issued to him on December 1st, 1908, and his pension was duly paid from the 1st of January to the 7th of May, 1909, when his pension was stopped, and his book taken up from him under the following circumstances :—

Pawley, being dissatisfied with the amount of his pension,
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on the 10th of March, 1909, by a letter addressed to the pension officer, claimed to be entitled to a pension at the rate of 5s. a week instead of 2s. He did not suggest that there had been any change in his means since the original grant of his pension, but complained merely of the manner in which the profits of his farm had been estimated. This letter was referred to the local pension committee as raising a "question" under section 7 of the Act; and that "question" was duly considered and determined by the committee, who on the 30th of March, 1909, decided, in accordance with their previous decision, that he was entitled to a pension at the rate of 2s. a week, and no more.

From this decision Pawley appealed to the Local Government Board, in accordance with the regulations made under the Act, and that body on the 4th of May, 1909, gave its decision, by which it was determined that the said William Pawley was not entitled to any pension whatsoever.

It has not been suggested that this decision was based upon any evidence of means other than that afforded when the pension was originally granted; and I assume for the purpose of my decision that there was no change in his circumstances, and no evidence that his means of support were in any respect different from what they were, and were known to be, at the time the pension was originally granted. The Local Government Board, as I understand the facts, simply estimated the profits of Pawley's farm at a somewhat higher rate than the pension committee had done, and upon this estimate deprived him of his pension. The question then arises whether this order was within their jurisdiction, or not.

The answer to this question turns upon the true construction of section 7 (2) of the Act. That sub-section provides that the decision of a local pension committee upon any claim or question which is not referred to the central pension authority shall be "final and conclusive." These words cannot mean that under no circumstances is the right to the pension to cease, or its amount to be altered, for under sub-section 1 of the same section provision is made for determining the question whether the statutory conditions "continue to be fulfilled" in the case of a person in the receipt of a pension; and section 3 provides that a

person may be disqualified for receiving a pension by certain circumstances, some of which may undoubtedly occur after the pension has been originally granted. Again, section 9, which has an important bearing upon the construction of the words "final and conclusive" in section 7 not only imposes a penalty, on summary conviction, of six months' imprisonment, with hard labour, for any person who, for the purpose of obtaining an old age pension, makes any false statement or false representation, but provides, by its 2nd sub-section, that, even apart from all questions of fraud or false representation, if it is "found at any time that a person has been in receipt of an old age pension, while the statutory conditions were not fulfilled in his case," he shall be liable to repay to the Treasury "any sums paid to him in respect of the pension while the statutory conditions were not fulfilled." It would be absurd to hold that while a man was undergoing imprisonment for a fraudulent statement under sub-section 1 of this section, or even while he was liable to repay to the Treasury all sums received by him in respect of the pension under sub-section 2, he could still be entitled to go on receiving his pension, because the original decision of the pension committee was "final and conclusive."

In my opinion, the word "found" in section 9 refers to the finding of some judicial tribunal, and points to the determination of a "question" under section 7. Such "questions" can be raised either by the pensioner or the pension officer, and when raised are to be determined in the manner pointed out by the Act. Three classes of questions are referred to in the section—(1) those relating to the fulfilment of the conditions when the pension is originally granted; (2) those relating to the continuance of the conditions while a person is in receipt of a pension; and (3) those relating to disqualifications under section 3. The clause providing that the original decision of a pensions committee is to be "final and conclusive" must be subject to the other provisions of the Act, *i.e.*, subject to the determination of a question duly raised under section 7 (1), or, I take it also, to a conviction for fraud under section 9 (1).

In what sense, then, is the original decision of the pension committee, if unappealed from, "final and conclusive"? In this sense, I think, that the findings of the committee upon the facts

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before it cannot at any time be set aside by any Court, or ignored by any Government official. The pension must be paid at the rate awarded until the determination of a question, properly raised under section 7, which either alters the rate of the pension, or may put an end altogether to the right to receive it.

In the present case the question was raised, not by the pension officer, but by the pensioner. It related only to an increase in the amount of the pension, and the claim for an increase was based, not upon any alteration in the pensioner's means, or even upon any fresh evidence as to the amount of his means at the time the pension was granted, but upon an allegation that the pension committee had erred in calculating the yearly value of those means.

It was boldly contended by Mr. Davidson, who argued the case with conspicuous ability on behalf of the pensioner, that neither the pension committee nor the Local Government Board had any jurisdiction to entertain this question at all. This was a strong proposition for him to urge, considering that the question had been submitted, and the appeal taken, by his own client; still I think that he was right. If the decision of a committee can be set aside without adducing any evidence whatever of means, other than that which was originally before the committee, I fail to see in what sense it can be considered "final and conclusive." The Local Government Board in this case treated the question raised by the pensioner as to the amount of his pension as if it were an appeal by the pension officer from the original award of the pension; and although the time for appealing had long elapsed, made an order depriving the man of his pension, on the same evidence as that upon which it had been originally granted. In my opinion they had no jurisdiction to make such an order. I concur with the other members of the Court that the appeal should be allowed and the conditional order made absolute.

I guard myself, as the other members of the Court have done, from expressing any opinion upon the argument that was pressed so strongly upon us, that there is no jurisdiction to deprive a man of a pension once granted, unless some evidence is given of change in his circumstances after the award of the pension. It is not

necessary for the purpose of the present case to so decide, and there are many difficulties in the way of doing so. Even putting aside the question of fraud, such a decision would involve, as I pointed out in the course of the arguments, the strange consequence that if a man had without his knowledge inherited a vast fortune at the time he was awarded his pension, he should be entitled to continue to receive the pension for his life, notwithstanding his great wealth. It would involve also, as Mr. Davidson candidly admitted, the conclusion that several of the regulations made under the authority of the Act are *ultra vires*, notably the 9th, which provides for fresh claims being sent in by persons who have been already refused pensions, for, of course, if the decision of the committee is "final" in this sense in the case of the grant of a pension, it must be so also in the case of a refusal.

There is a good deal to be said for the view put forward on the strict reading of section 7 (1), but it seems to me to be quite contrary to section 9. The question involved is one, however, which we are not called upon to determine in the present case, and we accordingly leave it open for future discussion and determination.

Solicitors for the appellant: *J. E. Peel & Son.*

Solicitors for the respondents: *T. T. Mccredy & Son.*

R. S1. J. C.

Appeal.
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THE KING
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BOARD.
Cherry, L.J.

K. B. Div. THE KING (SAMUEL DONNELL AND WILLIAM
1910. DONNELL) v. THE JUSTICES FOR THE CITY OF
Feb. 9, 14. LONDONDERRY (1).

Public Health—Nuisance—Order of Justices for abatement—Necessity of signature by majority of Justices concurring in order—Order not signed till several days after pronounced—Certiorari—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), ss. 112, 261, 279; Sch. C., Form C.

Summonses were issued under s. 111 of the Public Health (Ireland) Act, 1878, requiring the defendants therein to abate certain alleged nuisances. The summonses were heard before five Justices, and three of them being of opinion that a nuisance existed in each case, orders were made for abatement. Formal orders, following Form C in Schedule C to the Act, were drawn up, and were signed, several days after the decision, by two of the Justices, one of these being one of the dissenting Justices, and served on the defendants. After a conditional order had been obtained to quash the orders, they were signed by the other two Justices who formed the majority of the Court. Section 261 of the Public Health (Ireland) Act, 1878, takes away *certiorari* in the case of orders relating to the execution of the Act.

Held, (1) that the orders should have been signed by the majority of the adjudicating Justices; (2) that the omission of the signatures did not go to jurisdiction, and that such omission could be corrected by the Justices signing afterwards; (3) that the delay in signing and completing the orders did not warrant *certiorari*.

CERTIORARI.

The prosecutors, who were agents for the owners of certain house property in the city of Londonderry, were served with three notices by the sanitary officer of the city of Londonderry, calling for certain structural alterations alleged to be necessary to abate nuisances. The prosecutors, being of opinion that the alterations were not necessary, did not comply with these notices, and three summonses were issued at the suit of the sanitary officer, and served on the prosecutors, complaining of the nuisances on the respective premises mentioned therein. These summonses came on for hearing at the Petty Sessions for the city of

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

Londonderry, on the 9th December, 1909, before five Justices. Three of the Justices were satisfied that a nuisance existed in each case, two being of a contrary opinion; and an order was thereupon made in each case, which, as entered in the Petty Sessions book, was to the effect that the nuisance complained of should be abated within one calendar month, and that the defendants in the summons should pay for penalty £1, and for costs 8s. 8d. Formal orders were drawn up, following Form C. in the schedule to the Public Health (Ireland) Act, 1878, and ordering the prosecutors within one calendar month from service of a copy of the order on them to abate the nuisance, and for that purpose to execute certain works specified in the order. These last-mentioned orders were dated the 9th December, 1909. They were signed on the 17th December by two of the Justices, one of these being one of the Justices who had been in favour of making the order, and the other being one of the dissenting Justices. Copies of these orders were served on the prosecutors on the 18th December. It was stated during the argument on the present application, that, after the conditional order hereinafter mentioned had been obtained, the orders were signed by the other two Justices who made up the majority of the Court.

The prosecutors obtained on the 21st December, 1909, a conditional order for a writ of *certiorari* to remove for the purpose of being quashed the several orders and adjudications made at the Petty Sessions on the 9th December, 1909, on the hearing of the three summonses, and also the several convictions made in the premises, on the grounds, so far as material for the purposes of the present report—(a) that they were signed by two Justices only; (b) that they were not drawn up at the time or immediately after they were pronounced. Cause having been shown on behalf of the Corporation of Londonderry, the present application was to make the conditional order absolute notwithstanding cause.

Babington, for the prosecutors :—

The orders served should have been signed by the three Justices who concurred in making them. Possibly it may not be necessary in every case that all the Justices who made the

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order should sign it, but at all events where the Court is not unanimous the order should be signed by a majority of the Justices. In the present case the order signed by the two Justices, and served on the prosecutors, varies from the order actually made by the Court. That order, as appears from the certificate of the entry in the Petty Sessions book, directed the nuisance to be abated within one calendar month, that is of course from the date of the order, the 9th December, 1909; while the order served directs the nuisance to be abated within one calendar month from service of a copy of the order, that is the 18th December. No doubt in the form of order (C) given in Schedule C, to the Public Health (Ireland) Act, 1878, only two signatures are indicated; but this is intended merely as an illustration, and cannot be taken as amounting to a declaration that the signature of two Justices is sufficient in every case. The conclusion of the form shows that the Court which adjudicates should be described. *Wing v. Epsom Urban Council* (1) will perhaps be cited as showing that the signature of two Justices is sufficient. But in that case there were only three Justices altogether, so that two formed a majority of the Court. In *Ex parte Roynton* (2), it was stated on the face of the order that it was made by a majority of the Justices. The attaching of the signatures subsequently cannot validate the order. An order cannot be amended after it is made: *The King v. The Justices of Cheshire* (3). In *The King (Ewing) v. Justices of Down* (4), Andrews, J., no doubt appears to have thought that the defect could be cured by subsequent signature; but he expressly refrained, as did the other Judges in that case, from deciding the point.

Secondly. The orders should have been drawn up and signed at the time of the actual decision. By the delay in this respect our time for appeal has been shortened. The time for appeal is fourteen days, which runs from the date of the oral decision of the Justices, not from service of the formal order: Public Health (Ireland) Act, 1878, s. 269, sub-sect. 2; *The Queen v. Barnett Sanitary Authority* (5). The order, however, in respect of which

(1) [1904] 1 K. B. 798.

(2) 14 J. P. 129.

(3) 5 B. & Ad. 439.

(4) [1905] 2 I. R. 648.

(5) 1 Q. B. D. 558.

the appeal must be taken is the formal order signed by the Justices, which may vary from the order as entered in the Petty Sessions book: *The King (Ewing) v. The Justices of Down* (1). If therefore the signature of such order can be delayed, a defendant would be seriously prejudiced in his right of appeal, and might be practically deprived of it altogether by the signing being delayed for fourteen days.

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Henry, K.C., and *Osborne*, for the Corporation of London-derry :—

Signature by two Justices is sufficient: *Wing v. Epsom Urban Council* (2); *Ex parte Roynton* (3). The form of order, Form C, in Schedule C to the Public Health (Ireland) Act, 1878, which by section 279 is to be read as part of the Act, contemplates signature by two Justices only. The forms given in the Schedule to an Act of Parliament are to be given effect to in interpreting the Act: *Kane v. Mulholland* (4). The portion of the form requiring the Court to be described applies only, as is shown by the way in which the brackets are placed, to a case where the Court consists of a single Justice, such as a Dublin Divisional magistrate. But, even assuming that the order should have been signed by the three Justices who concurred in making it, the defect is cured by the necessary number subsequently signing: *Ex parte Johnson* (5); *Reg. v. Lanyon* (6); *The King (Ewing) v. The Justices of Down* (1), *per Andrews, J.*, at p. 657. By section 261 of the Public Health (Ireland) Act, 1878, no order made in relation to the execution of the Act is to be quashed for want of form, or removed by *certiorari*. The orders here are good on their face, and such as the Justices had jurisdiction to make, and *certiorari* should, therefore, be refused.

It is not necessary that the formal orders should be drawn up and signed at the time of the decision; this may be done at any time subsequently: *Ex parte Johnson* (5); *Reg. v. Lanyon* (6).

Babington, in reply.

Cur. adv. vult.

(1) [1905] 2 I. R. 648.

(2) [1904] 1 K. B. 798.

(3) 14 J. P. 129.

(4) 28 L. R. Ir. 59.

(5) 3 B. & S. 947.

(6) 27 L. T. N. S. 355.

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Feb. 14.

The judgment of the Court was delivered by—

GIBSON, J.:—

The orders in this case are sought to be quashed on the following grounds:—(1) They were only signed by two magistrates, though the cases were heard by a Bench of five; (2) the orders were signed and served several days after the actual decision in Court, and the applicants thereby were prejudiced in exercising their right of appeal, as the time for appealing runs from the oral adjudication, and before appealing they should have had an opportunity of seeing the binding order signed by the Justices; (3) the signed orders do not represent the oral adjudications, which were different. This last ground of objection fails on the evidence before the Court. The other points are of some difficulty. Of the five magistrates who sat, two were against making the orders, which represent the decision of the other three. The orders issued and served were signed by two Justices only, one being one of the two in minority. Since the conditional order was obtained, the other two magistrates who formed the majority it is stated have signed.

According to the *Down Case*, (1) the order of the Justices is not the entry in the Petty Sessions Book, but the document drawn up in accordance with Form C in Schedule. Was this document, signed only by two of the five adjudicating Justices, sufficient? The question was left open in the *Down Case* (1). Mr. Henry, K.C., contends that the schedule form shows that signature by two is sufficient. I doubt that the form has this effect; it only indicates the minimum number of Justices. The Summary Jurisdiction Act, 1848, section 14, directs the order therein to be drawn up in proper form by the Justice or Justices under his or their hand and seal, or hands and seals; yet the form in the schedule there only shows execution by one Justice. As to the signature of orders by Justices at common law, in cases outside the Petty Sessions Act and similar legislation, I stated my view in the *De Vesci Case* (2). Having regard to the possibility or risk of the written binding order representing an

(1) [1905] 2 I. R. 648.

(2) [1908] 2 I. R., at pp. 306-7.

amendment or alteration of the oral adjudication, to the reasoning in *Burke's Case* (1), and to such cases as *Jones v. Williams* (2), I think the order should be signed at least by the majority of the adjudicating Justices. In the present case, the order as drawn up would convey that the Court was composed of two magistrates, and that they concurred in making the order recorded in the signed document; whereas five sat, and two of the magistrates dissented. *Wing's Case* (3) is relied upon as deciding that signature by two is sufficient, and it is so cited in some works, but it only decides that an order signed by one Justice is invalid; it must be executed by two.

Supposing that, to be regular, the order should have been signed by the majority of the Justices, Mr. Henry next argues that the order being good on its face, *certiorari* being taken away by section 261, and the document truly recording the oral adjudication, the deficiency of signatures is not a competent ground of *certiorari*. The fault is not one of want of jurisdiction, but rather what in a Court of error would be called diminution of the record. *R. v. Tabrum* (4) rather supports this view. It was there held that signatures could be supplied under 12 & 13 Vict. c. 45 which enables matters of form to be remedied, not mistakes in point of substance: *Reg. v. Padbury* (5).

In the *Down Case* (6) my brother Andrews thought that the objection could be removed by the Justices signing afterwards, as was suggested in *Ex parte Johnson* (7), and as was actually done in *R. v. Tabrum* (4); see also *Reg. v. Cheshire Justices* (8). In *Battye v. Gresley* (9), it was held that where the tribunal (there commissioners of bankrupt) agreed on the substance when sitting together, the formal record need not be completed in the presence of one another. The reasoning in *Burke's Case* (1) and in the numerous cases as to the necessity of joint judicial action in Paley, and such cases as *Jones v. Williams* (2), show the nicety of the question.

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(1) [1905] 2 I. R. 309.

(2) 36 L. T. N. S. 559.

(3) [1904] 1 K. B. 798.

(4) 97 L. T. N. S. 551.

(5) 5 Q. B. D., at p. 128.

(6) [1905] 2 I. R. 648.

(7) 3 B. & S. 947.

(8) 11 A. & E., at p. 142.

(9) 8 East, 319.

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The last point was the delay in completing the orders by signature, whereby the right of appeal was, or might be, prejudiced. The objection might represent a substantial grievance, but it does not go to jurisdiction, and here the order corresponds with the oral decision. In *R. v. Boulthbee* (1) the conviction was not drawn up till after the time for appealing had expired. Lord Denman observed that convictions, &c., were rarely drawn up till the time of the sessions. *Reg. v. Cheshire Justices* (2) is another example of the same kind. There are many cases illustrating this, and amendments made in the final signed conviction before the return of the *certiorari*: *Ex parte Johnson* (3). No doubt orders were not similarly amendable, but the principle that the signed adjudication need not be contemporaneous with the oral decision is applicable.

On the whole, I have come to the conclusion that the conditional order must be discharged, but it is not a case for costs.

Solicitor for the prosecutors: *Patrick Maxwell*.

Solicitor for the Corporation of Londonderry: *Sir F. H. Miller*.

J. G. T.

(1) 4 A. & E. 498.

(2) 11 A. & E., at p. 139.

(3) 3 B. & S., at p. 952.

CONMY v. CAWLEY (1)

Appeal.
1910.

April 18.

Will—Construction—Clear gift not cut down by subsequent ambiguous words.

The testator, a small farmer, having by will left his farm and its equipment in clear and unambiguous language to his widow, continued his will as follows:—"This—should my son John return from America sooner or later to give my wife, his mother, the sum of £60, also one half acre of land and one cow's grass, that's if he be the owner or thinks well of it, and if not, she is at liberty to sell to anyone she likes after tendering to the said John."

Held, that these words did not cut down or affect the previous clear gift to the widow.

APPEAL from the judgment of the King's Bench Division on a case stated by Madden, J., on a civil bill appeal in ejectment at the Sligo Summer Assizes, 1909, the question for decision arising on the construction of the will of Denis Conmy, dated the 5th March, 1903, which was as follows:—"In the name of God, Amen. I, Denis Conmy of Tullylynn, in the parish of Castleconnor, in the county of Sligo, being now of sound mind and intellect, do will and bequeath to my wife, Margaret Conmy, my real and personal holding of land in the townland of Tullylynn, in the parish of Castleconnor, and things of every description, I leave unto my wife Margaret Conmy. This—should my son John return from America sooner or later, to give my wife, his mother, the sum of £60, also one half acre of land and one cow's grass, that's if he be the owner or thinks well of it, and if not, she is at liberty to sell to anyone she likes after tendering to the said John Conmy. No. 1st, Mr. Michael Conmy, one field, 1 crop of rye grass, one cutting, and then done with it. Patrick Coleman, 1 crop. Dan Battle, one field, 3 crops tillage. I mean this is the last will and testament of me."

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal.
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The testator died on the 27th March, 1903, John being then in America. The widow went into possession. John came from America, took out administration with the will annexed in October, 1903, and returned to America. He had offered the widow £60, and the other benefits provided for her, and the learned Judge was of opinion that, if entitled to acquire the lands under the will, he had done all that was necessary to entitle him to recover possession from her, or those claiming under her. The widow died on 20th March, 1909, having by her will, dated 13th October, 1908, duly proved, left the farm to the defendant. John Conmy obtained a civil bill decree for possession, from which the defendant appealed. On the appeal Madden, J., stated this case for the opinion of the King's Bench Division, the question reserved being whether the plaintiff, John Conmy, took under the will of Denis Conmy, and in the events which happened, any estate in the lands which would entitle him to maintain an ejectment.

The King's Bench Division gave judgment in favour of the defendant, and the plaintiff appealed.

Pigot, K.C., and Denning, for the plaintiff (appellant):—

"This" following the gift to the wife is equivalent to "provided that." It introduces an alteration in the previous disposition. There are two events contemplated—(a) that John should take the farm, giving his mother £60, half an acre, and a cow's grass; (b) that in lieu of taking it subject to these burdens he is to get the first offer of it in case of a sale. In either event the testator intended to confer some benefit out of the farm on the son. "If not" must be the alternative to "if." "If he be" the owner means, "if he becomes" the owner, *i.e.* under the will. It would be a most natural and usual disposition for a testator so circumstanced to make. The respondent will probably rely on *Thornhill v. Hall* (1), and cases of that class; but they really do not touch the present case, which must be dealt with on the language of the will, which may be obscure, but is not

unintelligible, and the only rational construction of which is that which we suggest.

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Fetherstonhaugh, K.C., and *Price*, for the respondent :—

Our argument is contained in the first paragraph of the head-note in *Thornhill v. Hall* (1):—"It is a rule of the Courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate." In that case Lord Brougham says :—"I hold it to be a rule that admits of no exception, in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*."

Here you have a gift to the wife in clear, plain, and unambiguous language. That is followed by words which are insensible. There is no gift at all in the will to the son. At most there is an idea expressed that he might have some title to

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the farm independently of the will. In *Bell v. Bell* (1) Shadwell, V.-C., expresses the rules of construction in such cases as being that a preceding unambiguous gift shall not be cut down by a subsequent implied one. In *Kerr v. Baroness Clinton* (2), Lord Romilly held that an express gift cannot be revoked by words which, if standing by themselves, would be sufficient to raise the implication of an inconsistent gift. See also *Percy v. Percy* (3), where Bacon, V.-C., said that where a testator has made a gift in "language not to be mistaken" it cannot be affected by subsequent inept words. In *Abbot v. Middleton* (4), Lord Chelmsford (at p. 84) adopts the words of Lord Brougham in *Home v. Pillans* (5):—"Where there is a clear gift it can only be altered and retracted by the most plain, and unambiguous, and unequivocal words."

Pigot, K.C., in reply.

The cases cited merely follow *Thornhill v. Hall* (6). There it was sought to cut down a clear gift in one part of a will by ambiguous and uncertain words in a separate and distinct part of the same will. Here you have no separation of the clauses. It is a single, unbroken, and complete disposition of the farm in every event within range of the testator's contemplation.

THE LORD CHANCELLOR:—

We are of opinion that the judgment of the King's Bench Division must be affirmed. I think that in the earlier part of the will there is a clear gift of land to the testator's widow, followed by unintelligible words which cannot have the effect of cutting it down. This is a clear rule of law which has the authority of the House of Lords. Here there is the clearest gift to the widow not only of the farm but of its equipment. The words are these:—"I Denis Conmy . . . do will and bequeath to my wife, Margaret Conmy, my real and personal holding of land in the townland of Tullylynn in the Parish of Castleconnor, and things of every description, I leave unto my wife Margaret Conmy."

(1) 3 Jur. 554.

(2) L. R. 8 Eq. 462.

(3) 24 Ch. D. 616.

(4) 7 H. L. C. 68.

(5) 2 Myl. & K. 25.

(6) 2 Cl. & Fin. 22.

The alleged alteration in bounty is founded, not on any gift in the will to John, but on whether he returns from America. If he returns, then he shall, by virtue of his possession, give to his mother £60, half an acre of land, and one cow's grass. That is, if he becomes owner by some supposed title which at all events is not derived under the will.

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The Lord
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I do not understand what follows—the gift to Michael Conmy and two other men.

But there being a clear gift in the first instance to the widow, we see nothing coming after to lead us to interfere with it.

HOLMES, L.J. :—

I find here the gift of a small farm and its equipment—a gift in clear and unambiguous terms to the testator's widow. This is followed by other provisions which are neither clear nor unambiguous, and to which it is impossible to give a certain construction. That would, I think, be sufficient to dispose of the case. I cannot get rid of a clear gift by unintelligible words following it.

But if I were to try and gather from these words what was in the testator's mind, I should be disposed to say that he thought that so long as the son remained in America he would have no title to the land, but that if he came back he might, not by reason of anything in the will, but by some title outside it, have a right thereto; and in that event he appealed to the son to do something for the widow. I may be wrong in this. But whether I am so or not, I am merely guessing at what he intended; and there being an antecedent clear gift, these subsequent words are insufficient to affect it.

CHERRY, L.J. :—

I concur. I think it is sufficient to base our judgment on the principle that a clear gift in a will can only be cut down by words equally clear. If I were to hazard a conjecture as to what was in the testator's mind when he wrote the latter part of his will, I should say that he believed that his son John, if he returned home from America, would have some title to the land after his (the testator's) death, and that in that event his own

Appeal. power of disposing of it by will would be in some way limited.
 1910. But this is mere conjecture. Except the gift to his wife, which
 CONMY is clearly and definitely expressed, everything else is confused
 v. CAWLEY. and contradictory. If possibly we are not able to give effect to
 Cherry, L.J. the whole of the testator's intentions, we can at least carry out as
 much of them as we can understand and interpret.

Solicitor for appellant: *H. C. Bourke.*

Solicitor for respondent: *Hubert J. Tully.*

W. G.

Appeal.
 1909.

M'CARTAN v. BELFAST HARBOUR
 COMMISSIONERS (1).

Dec. 8, 9, 20.

*Master and servant—Hiring for particular service—Master whether parting
 with control of servant to hirer—Negligence causing injury to hirer's
 servant—Common employment.*

The Belfast Harbour Commissioners have under their statutory powers the control of the harbour and of all piers, docks, and quays, belonging to it; and it is their duty to assign a berth to a vessel to be discharged in the port, they have power to provide cranes for the unloading of such vessels, and it is their duty to provide proper servants and labourers for working such cranes for the use of the public (2). The master of a vessel hired a crane from the Commissioners for the purpose of her discharge. He signed a request for its use, subject to the Commissioners' regulations, containing an agreement that he was to be responsible for all loss or damage arising from any improper use of the crane while so employed. The crane was put in position by the crane-man, and the vessel was moved to a berth opposite it. The practice is that the buckets are filled by the hirer's servants, in the hold, one of whom directs the crane-man to raise and lower each bucket, and to swing round the arm of the jib. The crane-man regulates by a brake the speed of ascent and descent of each bucket, and he alone works the machine. While the plaintiff, being employed for that purpose by the ship-master, was filling a

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) Harbour Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), ss. 21 and 22, incorporated by Belfast Harbour Act, 1847 (10 Vict. c. lii, sect. 5).

bucket in the hold, an empty bucket, while being lowered by the crane, descended with great speed and violence, and struck plaintiff, who was seriously injured.

The craneman was employed and paid by the Commissioners, who alone could dismiss him. Except in directing buckets to be raised or lowered, neither the hirer nor his servants had any control over the craneman. If the ship-master was dissatisfied, his only remedy would be to direct the craneman to stop working, and to apply to the Commissioners to send another in his place, which they might or might not do. In no event could the hirer employ a servant of his own to work the crane; or procure a crane workable on the pier from anyone but the Commissioners.

In an action by the plaintiff against the Commissioners to recover damages for personal injuries, the jury found that the hirer had no authority to control the craneman otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets; that the bucket which injured the plaintiff got out of the control of the craneman through his negligence; and that this negligence was the cause of the accident.

Held, reversing the judgment of the King's Bench Division, who followed *M'Fadden v. Belfast Harbour Commissioners* (unreported, K. B. D., 11th May, 1903), that the plaintiff was entitled to a verdict, that the agreement of the hirer to be responsible for any improper use of the crane afforded no defence to the plaintiff's action, and that the plaintiff and craneman were not at the time of the accident fellow-servants engaged in a common employment.

Donovan v. Laing, Wharton and Down Construction Syndicate ([1893] 1 Q. B. 629) distinguished.

ACTION for damages for personal injuries sustained through the negligence of the defendants and their servants.

The statement of claim was as follows:—

1. On the 25th January last the plaintiff was engaged assisting to discharge a cargo of square setts from the schooner "Busy Bee," then lying in Clarendon Dock, Belfast. 2. Through the negligence of the defendants in and about the management of a crane on the said Clarendon Dock, and by supplying an inefficient man to work said crane, a bucket was thrown or let fall upon the plaintiff causing him severe personal injuries, and putting him to expense for attendance and medicines, and rendering him for a very long time unable to attend to his business.

The plaintiff claims £1,000 damages.

In reply to the defendants' notice for particulars, the plaintiff

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alleged that the defendants were negligent in the management of the crane referred to in the pleadings—

(a) By lowering the bucket without warning; (b) By lowering the bucket before having received instructions so to do (1).

The statement of defence was as follows:—

1. The plaintiff was not engaged assisting to discharge the cargo of square setts, as alleged in the first paragraph of the statement of claim, or at all. 2. The defendants deny that they were guilty of the alleged or any negligence in or about the management of the said crane. 3. The defendants deny that they supplied an inefficient man to work the said crane, or that they were guilty of the alleged or any negligence in the supplying of the said man. 4. The defendants deny that the said bucket was thrown or let fall upon the plaintiff. 5. It was not by reason of the alleged or any negligence on the part of the defendants that the said bucket was thrown or let fall upon the plaintiff. 6. The defendants deny that the plaintiff suffered the alleged or any injury or damage. 7. It was not by reason of the alleged or any negligence on the part of the defendants that the plaintiff suffered the alleged or any injury or damage. 8. The person or persons engaged in the management and work of the said crane was not or were not at the time of the alleged accident, or for any purpose connected with the discharge of the said cargo, or at all, the servant or servants of the defendants. 9. In the alternative, the defendants say that it was a term of the agreement entered into between them and William Chambers, the master of the said schooner, "Busy Bee," for the hiring and use of the said crane by the said William Chambers, for the purpose of discharging the said cargo from the said schooner, that the said William Chambers should be responsible for any loss or damage which might arise from any improper use of the said crane during the time that it was engaged in the unloading of the said schooner, as the plaintiff previously and at the time of the alleged accident well knew, and that the alleged injury to the plaintiff arose solely from such improper use of the said crane.

(1) The particulars were amended at the trial, *infra*, p. 481.

The plaintiff by his reply joined issue, and submitted that paragraph 9 of the statement of defence was no answer to the action.

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The action was tried by Madden, J., with a special jury of the city of Belfast, on the 15th and 16th of December, 1908. The following is the material portion of the evidence taken from the report of the learned Judge.

Edward M'Ilwain, mechanical engineer, examined the place on 20th October. The crane was on the rails. From the edge of the quay wall to the deck is from 8 to 9 feet. The hatch was 10 feet by 7 feet 6 inches. Each bucket could carry 4 cwt. If only one bucket was out, the craneman could see into the hatch. The jib of the crane is 31 feet 6 inches long. Its radius is 24 feet from the centre. The rope is coiled round a drum. It is coiled and uncoiled by machinery. There is a brake to regulate speed and assist the engineer in regulating it, so that an efficient crane-man could prevent a bucket dropping into the hold. When a bucket descended too rapidly, it would indicate that the man had lost control of the crane. There are 110 feet round the drum. From top of the jib to the deck is 20 feet.

James M'Cartan, the plaintiff, stated that he was a sailor, from Annalong, thirty-seven years of age. Three boats were bringing cargoes of setts. All the crews helped in the discharge—three hands in each. I belong to the "Christina." I was ordered on board the "Busy Bee." The hatch was open, and the cargo close up to it, about 2 feet. Chambers and Mayhew were on the bank. There were no empty buckets in the hold. We filled a bucket, and it was taken up by the crane. We proceeded to fill the second bucket. They were doing something on deck. I continued filling. I remember a bucket hitting me on the back. No order was given from the hold to lower the bucket. An empty bucket was never lowered, or a full one taken up, without an order from the men in the hold. They could be heard by the craneman. I am twenty years at the work. Only one bucketful had been taken out of the hold. Empty buckets are always lowered gradually. I never knew one come with a rush. The men in the hold catch them and unlock. [He then gave evidence as to the injuries, but as the amount of the damages was not objected

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Cross-examined.—The “Busy Bee” carried 140 tons. Was not all full. If loaded all over, would carry 286 tons. We were working carefully. I was stooping down filling stuff. J. Chambers and Mayhew were in the hold. W. Chambers tipped the buckets. I did not give him any directions. The hatchman gives instructions to lower or heave up. There were none given then. I did not hear Chambers give orders.

Re-examined.—A hatchman was never employed in my time. I never saw the canter give orders to hoist or lower.

Joseph Chambers deposed.—I was on the “Christina.” She had been unloaded. Some time before ten o’clock the “Busy Bee” began unloading. I was in the hold. She was brought round into position. One bucket only was taken out of the hold. I have been a sailor for one and a half years. The man in the hold tells the craneman when to lower. The second bucket came down all right, and we were loading it. The third came all of a slash. No order had been given. It hit the other bucket, struck the plaintiff, and knocked him senseless. There was a coil or two slack wire-rope in the hold. Duffy (1) said, “I would not for £100 it happened. It would be a bad job for me.”

Cross-examined.—Duffy always got an order before lowering. The mate, Chambers, was on deck at the time. He was shifting the boat astern. Captain Chambers was canting on the quay. They were shifting the boat at the time of the accident. There was no heap of stones on the quay. I acted as hatchman.

William Mayhew deposed—I have been a sailor on the “Progress” for eighteen months. I was in the hold of the “Busy Bee.” The first bucket was safely taken out; we were filling the second when the first came back. It came down with a crash, struck a bucket, and hit plaintiff. No word was given to lower the bucket. One load had been taken out. Two or three coils of rope came down. I have often unloaded in the dock. The signal was given by the men in the hold. The Captain and Duffy were talking after the accident. The other boats had been

(1) *I. e.* the man working the crane.

unloaded at the same berth. Some of their loads were on the quay.

Cross-examined.—180 tons was taken from the two. Captain Chambers was 4 or 5 feet from the edge of the quay. We were all stooping filling the bucket.

William Chambers, Captain of "Busy Bee," deposed.—Arrived 21st. Signed paper (1). The other captains signed similar papers. All the boats were discharged by the same crane. "Busy Bee" placed in berth on the evening of 24th. Portion of the cargo of the other boats was on the quay. Plaintiff was asked to help in the ordinary course. The captain cants his own boat. A man appeared to take charge of the crane. I am fourteen years at the work using cranes. The defendants always supplied a man to manage the crane, also fuel for the engine. Apart from giving signals for the raising or lowering or bringing round of the jib, neither I nor anyone on the boat ever interfered with the management of the crane. I had nothing to do with the selection of the crane-man, nor had I power to discharge him. I never paid him. Until after this accident a hatchman was never employed in connexion with the discharge. When the jib swings round, the crane-man gets the signal to lower the bucket into the hold. The bucket is tipped by means of the catch. I never, when acting as canter, gave orders to the crane-man to lower into the hold. I would have no opportunity of judging the time when it would be safe. The cargo was about 3 feet down from the hatch. Two empty buckets were in the hold. One was filled and taken out of the hold, swung ashore, and I canted it. It was then discovered that the hatch was not exactly under the jib. The boat was moved astern. The jib was partly over the quay. No order was given to the crane-man after the boat was got into position. It (apparently the jib) went round aboard. The bucket went slap-bang into the hold. It is usually lowered gradually. No order was given to lower the bucket when I saw it starting. I shouted "look out." I attended to plaintiff. A coil or two of the wire was lying in the hold. Duffy cried to me that it was his fault. He left the crane-house.

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Cross-examined.—Messrs. Gordon are owners. I had not seen Duffy before to my knowledge. I told him to have steam up after breakfast. I told them at the harbour that I wanted it after breakfast, nine o'clock. The accident was between nine and ten. Only one tub went up. I was canting on a place by itself. I did not give orders. The harbour official made me put on a hatchman after the accident. Another craneman took Duffy's place. There was no work done until the other man came up. Duffy came back and finished the day. I did not go over to the quay wall and give the order to lower when the boat was got into position. I point out when the crane is to be placed on the rails. I could do nothing with the craneman if he did not do this right. The man in the hold tells the craneman to stop. He would go on lowering until told to stop. I was off the quay a piece when I shouted "look out," six or seven feet.

Re-examined.—The craneman goes off at a regular hour for his meals. I do not know the name of the second craneman. He was selected by the Harbour Commissioners.

Hugh Hall said—I was on the "Busy Bee." I was fourteen years on the vessel. The man in the hold gives orders. No hatchman ever employed. (The evidence of this witness was the same as the captain's as to the hoisting of the first bucket, and hauling the boat astern.) The jib of the crane came round. The bucket came down with a bang. No signal was given to lower it. I saw the bucket with a coil of slack wire on the top of the stones. Duffy came to the front of the crane and said, "The crane is not working." I heard no more.

Cross-examined.—I cannot say when I saw Duffy first, or how long he was getting up steam. Duffy could have seen the men at the offside at the hatch. I cannot say whether they were there.

William Chambers, the mate, said—I was on the "Busy Bee." I have been twenty-seven years in the vessel. Hatchmen were never used in the Clarendon Dock. The craneman has full view of the dock and hatchway. The man in the hold gives the word to lower. The bucket is lowered gently, and they sing out to stop. The other boats discharge without a hatchman. I cannot say when the loading began. I was on board the "Busy Bee."

The position of the boat was changed after a bucket was taken out. The bucket came down with a bang. It was not under control. I shouted "look out below." A portion of wire-rope was on the stones. I went to the hospital with plaintiff.

John Chambers, mate on the "Progress," said—The man in the hold gives orders to lower. Never saw a hatchman in one of these vessels. I have been thirteen years in them. I was on deck when the accident occurred. (Same evidence as to the first bucket and the shifting of the vessel.) There was no signal to lower the bucket. It went down slap-bang into the hold. There was a coil of rope round it. Duffy said it was the crane's fault to those on board the ship.

Thomas Chambers, captain of the "Christina," deposed—Plaintiff was on this boat. I canted for my ship. No hatchman was employed. Duffy was craneman. The men in the hold gave orders. I have been seventeen or eighteen years with these small boats. I never knew a hatchman employed.

William Irwin said—I am in the employment of the ship-broker's agent, Keenan. I went to dock. The tub was hanging over the hatch. It was near ten o'clock. I have seen unloading for twenty-three years. The men in the hold give orders. I did not see the fall. I heard a shout, and went to see what had happened. I saw some loose wire-rope partly round the bucket. The cargo was close up at the beginning of the discharge, and the men could be seen from the quay, and better from the crane. Duffy said it was entirely his (Duffy's) fault, and that he would not for a good deal the man was hurt.

Cross-examined.—I am clerk and manager. Keenan sent me to see whether there was delay in starting the discharge. But it was the "Busy Bee" started under the crane. I do nothing about the actual discharge. The captain brings his boat under the crane, which is put in position by the Harbour Commissioners. It is adjusted to the ship.

Peter M'Vane, shipbroker, deposed—I am familiar with the mode of discharge of vessels of this kind. I have never seen a hatchman. The order is always given by the man in the hold. I never knew the canter give orders. The length of the rails is about fifty yards.

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Jacob W. Keenan, a shipbroker for twenty years, and agent for these boats, said—I am familiar with discharge. Never saw a hatchman in boats of the kind. (Application for crane and docket entered (1).) It is easier to move the ship than the crane. It is the usual practice to do so.

Cross-examined.—I have engaged cranes. I have objected to cranemen. I have gone into the harbour, seen the superintendent of the cranes, and made a complaint. Sometimes there is no notice taken of it. On two occasions they did take notice of it. They dismissed on one occasion, and sent a man in his place. The man I complained of did something dangerous. I did not stop him; I could not. The men would not work with him and he had to stop. I was taking charge of the loading. They sent another man and dismissed the first man. The other man was not taking sufficient lifts. I did not stop him. I complained, and they replaced him with another man. I cannot stop the work. I can stop my own men. I can tell when to raise the bucket or lower it, and place the material. The meal hours are mutually arranged. I have no hatchman. I do no unloading. In steamers, where the hold is deeper, they employ a hatchman. The order to lift or lower is given from the far side.

Cross-examined.—The craneman would never take orders from me. I had to go to the harbour.

Re-examined.—They have refused to take from me an order to alter the angle of the jib and arrange the boat. The "Sea-point," Albert Quay, was the ship loading iron ore. I do not know the craneman. I think the crane was No. 40.

At the conclusion of the plaintiff's case, Gordon, K.C., for the defendants, asked for a direction, which the learned Judge refused to give.

Thomas Duffy, the craneman, deposed—I have been in the employment of the defendants as a craneman since December 27th, 1907. I was engaged by Brereton. I had previously acted as craneman for upwards of nine years. I am still in the defendants' employment. There was no complaint of any importance. I went to the crane at 6 o'clock. I looked over it, got up steam,

(1) See copies, *infra*, p. 482.

and remained with it. The unloading began at 9-10. Captain Chambers was there. He gave orders to lower on the boat at the far side of the hatch, at B on map, and the first time for raising. He then came ashore and canted the tub. The accident occurred about half an hour after. About eight to twelve buckets were taken out. I got an order either from the captain or from the men in the hold. He canted the tubs, and sometimes went on deck. After the first two or three tubs I could not see the men in the hold. I was hanging the tub over the hatch before the accident occurred. The tub was about half-way between the boat and the jib. Captain Chambers was in sight on the edge of the quay. He gave an order to lower the bucket. I did. It was then half-way between the deck and the jib. It was lowered in the ordinary way. I had it always under control, and it did not come down with excessive speed. I was using the brake. I use it when lowering the bucket. The brake was in perfect working order. On other occasions I received word when to stop. On this occasion I received no such word. I intended lowering until I got word or until the tub would rest. I heard a shout—"What did I mean? Somebody was killed." A man put up his head and said, "You have killed a man." I secured the brake. I saw the man brought on deck. I went for the ambulance and got a constable. Afterwards I saw M'Ilwain in charge. I was about half-hour off work. M'Ilwain came in about half-hour. I did not say it was my fault or the crane's fault. A man said he would not have it happen for £100, and I said I was sorry. I worked under the direction of the hirer. I was not interfered with in any way by a harbour official in loading or unloading. Brereton engaged me, the foreman of the harbour. I was to do what I was told by the hirer. I always obeyed these instructions. M'Ilwain worked the crane until about 10.30. I went away for a time.

Cross-examined.—I was principally at overhead cranes, but also at all sorts of cranes similar to those of the defendants. I had discharged three or four boats before this one by this crane. There were no regular hatchmen. I got orders sometimes from the canter. He occasionally went to the ship. There is separate gearing for swinging round. The tub should be lowered gradually.

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It is my duty to lower it so. It would be a breach of my duty to let it go with a rush. When there is another tub being filled an empty tub should be lowered so as to do no harm to anyone. I can know by the brake when the tub has reached the bottom. I would not go on lowering after that. I was lowering under control and using the brake. Before it reached the bottom it got a shove somehow and cast to one side. I was using the brake. I heard no one shout "look out." I heard it rattle against the stones. I was not on board. The brake controls the descent of the bucket. The brake was in perfect order. Except as to the order to descend Captain Chambers did not interfere. We average about 20 tons an hour. About 12 cwt. is a bucket. M'Ilwain was sent by the Harbour Commissioners. I was taken away to report to the defendants.

William M'Ilwain deposed—I was lending a hand in connexion with the cranes. I gave directions to Duffy. Brereton is over me. I told Duffy to work at 9. He was ready a few minutes after. I had not seen the crane working that morning. I have nothing to do with them when they are let out. Duffy told me of an accident. In about half-hour I went to the crane. Duffy was working. I worked the crane. They had put on a hatchman.

Cross-examined.—Duffy was employed and paid by the defendants. It was his duty to manipulate the machinery. This required a skilled man. The hirers have nothing to do with the driving of the crane, only with giving the orders. The defendants supply fuel.

William H. Brereton deposed—I am foreman of the crane-men. I came to the crane about ten minutes to 10. The crane was worked by Duffy. There were about 10 tons where the setts were placed. I instructed Duffy to do what he was told by the stevedore or merchant, that is to say by the hirer. I never interfered with the work of the crane. No one for the defendants interferes with the man working the crane.

Cross-examined.—I do not suggest that the hirer has any right to interfere with the mechanism, but only as to the time of raising and lowering.

Re-examined.—The hirer could stop the crane-man.

Thomas Burke, said—I am superintendent of the cranes. I

am a mechanical engineer. I heard of the accident about 10 o'clock. Went to crane. Duffy was in the crane. Captain Chambers complained to me about it. I had nothing to say to it. The man had it under his absolute control. There were 10 or 11 tons of stone on the quay. No member of my department interfered with the discharge of the vessels. When a complaint is made, I take the man from the crane and investigate the case. The hirer is given a choice among the cranemen. They usually have their favourite man. Duffy is still in our employment.

Cross-examined.—The boat was discharged in about seven hours. It is only by a complaint to me, or to the superintendent, that the hirer can get rid of an objectionable craneman. (Regulations put in. See copy, *infra*, p. 484.)

The learned Judge in his report stated that, during the course of the evidence given for the plaintiff, counsel for the defendants objected to a question which was put with a view to proving that the craneman was guilty of negligence in the management of the crane, as a result of which the bucket descended with dangerous rapidity, on the ground that negligence of this class was not included in the particulars furnished: he allowed the particulars to be amended, and admitted the evidence objected to. He did so because he was of opinion that the defendants had not been taken by surprise, and because evidence conversant with the negligent management of the crane by the craneman had been admitted without objection before the point was raised on behalf of the defendants.

The following requisitions were handed to the learned Judge:—

(1) On behalf of the plaintiff—

I respectfully ask your lordship to direct that there is no evidence proper to be submitted to the jury that Duffy was in the service of Chambers as regards the management of the engine and machinery of the crane, and the control of the rate or speed at which the tub was lowered at the time of the accident.—D. M. WILSON.

(2) On behalf of the defendants—

(1) Defendants' counsel objects to question No. 1 (1) being

(1) See questions, *infra*, p. 486.

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submitted to the jury, on the ground that upon the evidence a direction on this question in favour of the defendants is matter of law. (2) And the defendants' counsel also object to question 2, on the ground that there was no evidence of negligence on the part of Duffy.—A. H. BATES.

The following documents with reference to the use of the crane on the occasion in question were given in evidence:—

Belfast, 21st Jany., 1908.

To the Belfast Harbour Commissioners.

I request to be allowed the use of the 1 2 Tons Steam Crane for following Vessel, viz.:—"Busy Bee."

To unload Stones

To load

subject to the usual Rates and Regulations relating to the said Crane.

And I hereby agree to be responsible for all loss or damage which may arise from any improper use of the Crane during the time it is so engaged.

The Crane is engaged by ton

W. CHAMBERS.

Entered No. 405.

BELFAST HARBOUR COMMISSIONERS.

Harbour Office, 21st Jany., 1908.

TO THE HARBOUR MASTER.

Mr. W. Chambers having signed the Application Book for the use of the 1 2 Tons Steam Crane for following Vessel, viz.:—"Busy Bee,"

is entitled to have such Vessel placed in the Crane Berth in regular turn.

THOS. N. BURKE.

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TO THE CRANE KEEPER.

Mr. W. Chambers is entitled to the use of the 1 2 Tons Steam
Crane for following Vessel, "Busy Bee," _____

to unload Stones, and _____ to load

Engaged by ton.

THOS. N. BURKE.

Steam ordered on _____ Crane at _____ on _____
for _____ o'clock. Will Harbour Master please say if the
necessary berthing arrangements have been completed
accordingly?

_____ Supt. of Cranes

_____ Harbour Master.

[endorsed on back above].

Vessel's Name, "Busy Bee."

2 Tons Crane. Steam.

TIME ENGAGED.		LIFT.	ARTICLE.	WEIGHT.		AMOUNT.		
From	To			Tons.	Cwts.	£	s.	d.
9-10 Morning, Jan. 25	4-40 Evening, Jan. 25.					1	3	4

W.M.

T. C. Q.

Belfast and N.C.R.C.

Belfast and C.D.R.C.

Great N.R.C.

Overtime _____ £ _____

Detention _____ £ _____

R.E.G.

T. Duffy, Crane Keeper.

I Certify that 140 : 0 : 0 of P. Stones have been unloaded, Ship,
_____ and charges
incurred as above.

THOS. N. BURKE, Superintendent of Cranes, &c.

Dated 30th Jany., 1908.

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Vessel's Name, "Busy Bee."

2 Tons Steam Crane.

*I certify that the following is a correct return of the weight of
P. Stones unloaded by Crane :—*

DESCRIPTION OF GOODS.	WEIGHT.		
	Tons.	Cwts.	Qrs.
Stones, ...	140	0	0

J. W. KEENAN,

Agent or Owner.

BELFAST HARBOUR COMMISSIONERS.

REGULATIONS FOR THE USE OF THE CRANES AND MASTING SHEERS ON THE QUAYS.

1. Applications for the use of the cranes are to be made at the Harbour Office, on forms provided for the purpose; and, if required, a deposit to cover the charges therefor must be paid, for which a counterfoil receipt will be given. A certificate or order will be issued to the applicant, entitling him to the use of the crane, on the production of which to the harbour master arrangements will be made to place the vessel in turn in the crane berth.

2. Every application must distinctly state the name of the vessel for which the use of the crane is required, and whether by time, for single lifts or otherwise.

3. Any person who has made the necessary application for the use of the large steam cranes, as provided for by Regulation No. 2, will be allowed to use the cranes during the time covered by the application for any vessel in his charge, or of which he is

the owner, managing owner, consignee, or agent, on condition that the names of the vessels be duly specified in the application, and that they take their regular turns for the crane-berth.

4. Vessels in possession of the crane-berths, but not requiring to use the crane before or after working hours, shall vacate the berth in favour of vessels having occasion to use the cranes during such period.

5. If the vessel be not prepared to make use of a crane in the order in which she is booked, she shall forfeit her turn in favour of the next vessel ready for the crane.

6. No vessel will be permitted to retain a crane-berth to the prejudice of another vessel, unless she is actually using the crane.

7. Any vessel having to leave a crane-berth owing to a stoppage of the work will be considered first on turn when ready to proceed with such work.

8. The full rate according to scale will be charged for the use of any crane booked by time, so long as any of the vessels named in the application occupy the crane-berth, or until a notification be given to the crane-keeper that the crane is no longer required.

9. The maximum weight to be lifted by each crane is painted thereon, and is not, under any circumstances whatever, to be exceeded.

10. The Harbour Commissioners will not be responsible for any loss or damage that may arise from the improper use of the cranes.

11. Any question which may arise as to the meaning of any of the foregoing regulations, or as to the rates to be charged for the use of the cranes, shall be determined by the secretary.

12. The expression "cranes" in the foregoing regulations includes the masting sheers.

NOTE.—The Commissioners on the 5th March, 1895, confirmed the following regulations, viz. :—

"That any person who has made the necessary application for the use of the small steam-cranes by time, as provided for by Regulation No. 2 of the regulations for the use of the cranes and masting sheers, be allowed to use the cranes during

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the time covered by the application for any vessels in his charge, or of which he is the owner, managing owner, consignee, or agent, on condition that the names of the vessels be duly specified in the application, and that they take their regular turns for the crane-berth, and, further, to use such cranes during any unexpired portion of the initial period of twelve consecutive hours for loading cargo off the quay, or otherwise : provided always that no other vessel requiring the use of a crane be prejudicially affected thereby."

[There followed rates for the use of cranes.]

The jury answered the questions put to them by the Judge as follows :—

1. Had the hirer authority to control Duffy otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets? No.

2. (a) Did the bucket which caused the accident get out of Duffy's control in its descent? Yes.

(b) If so, was this the result of negligence on the part of Duffy? Yes.

(c) If questions (a) and (b) are answered in the affirmative, was the injury to the plaintiff caused by Duffy's negligence? Yes.

3. If your verdict is for the plaintiff, assess damages. £750.

The learned Judge stated in his report :—

Counsel on behalf of the defendants mentioned a case of *M'Fadden v. The Belfast Harbour Commissioners* (1) which was tried before Lord Justice Holmes, in Belfast, at the Spring Assizes of 1903, in which the Lord Justice directed a verdict for the defendants in an action of negligence brought against defendants in the present action. It appeared that the ruling of the Lord Justice was upheld by the Court of King's Bench. I was furnished with a copy of the Lord Justice's report of the trial before him.

(1) Unreported.

From this report it appeared that the negligence on the part of the defendants upon which the plaintiff mainly relied was improper construction of the crane, to which the occurrence was attributed. The jury, by their answer to the first question submitted to them, negatived negligence of this kind. They answered in the affirmative the second question: "Did the accident arise from the negligence of Postlethwaite" (the craneman)? and the Lord Justice held, having regard to this answer, that the case could not be distinguished from *Donovan v. Laing* (1). It appeared to me that the answers of the jury to questions 1 and 2 (a) and (b) distinguished the present case from *M'Fadden's Case* (2), and also from *Donovan v. Laing* (1), inasmuch as it was found by the jury that the hirer had no control over the craneman in relation to the working of the machinery of the crane. It could not be disputed that the craneman was the servant of the defendants, except so far as he was placed under the direction and control of the hirer of the crane, which the jury found to extend only to placing the crane in position and raising and lowering the buckets. If the accident had been attributed by the jury to negligence in the part of the work which was done under the orders and control of the hirer, I should have directed a verdict for the defendants; but as it was attributed by them to negligence in a matter outside the control of the hirer, I felt at liberty to give effect to the verdict of the jury by giving judgment for the amount awarded. Accordingly, on the findings of the jury, I gave judgment for the sum of £750, with costs, staying execution until the second day of Hilary Term.

Upon motion by the defendants, the King's Bench Division (Palles, C.B., and Johnson, J.) on the 11th June, 1909, set aside the judgment for the plaintiff, and entered a verdict and judgment for the defendants with costs, the Court being of opinion that they were bound to do so by the previous decision of the Divisional Court in *M'Fadden v. Belfast Harbour Commissioners* (2), the facts of which were admittedly undistinguishable.

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(1) [1893] 1 Q. B. 629.

(2) Unreported.

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1909.

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COMMS.

The plaintiff appealed.

D. M. Wilson, K.C., and *Williamson* (with them *Ronan, K.C.*, and *Chambers, K.C.*) for the plaintiff.

The King's Bench Division considered they were bound by their previous decision in *M'Fadden v. Belfast Harbour Commissioners* (1), which this Court is competent to review, and which we submit was erroneous. The defence of common employment is not open unless, at the time of the injury, the plaintiff was actually the servant of the defendant: *Cameron v. Nystrom* (2), following *Johnson v. Lindsay & Co.* (3). In delivering judgment in the former case Lord Herschell, L.C., says (p. 311): "Gellatly" (the person whose negligence caused the injury) "was employed and paid by the stevedores. At the time when he was doing the work in question, he was doing it for the stevedores, inasmuch as the stevedores were paid a lump sum for discharging the vessel; and it was to enable them to earn the sum so contracted to be paid to them that Gellatly was working at the time he did the act complained of. There was thus present every element necessary to establish that he was servant of the stevedores." *Donovan v. Laing* (4), on which the decision in *M'Fadden's Case* (1) mainly proceeded, was either wrongly decided, or Jones and Co. must have had power to dismiss Wand, which would distinguish it completely from the present case. In *Rourke v. White Moss Colliery Co.* (5) Whittle had sole control for the time being over the man Lawrence, and the defendants ceased to have any control over him. This is the view which was taken in *Moore v. Palmer* (6), and *Cahalane v. North Metropolitan Railway and Canal Co.* (7), where Lord Esher says (p. 612) that, in the absence of clear and uncontradicted evidence that the general employer gave up control, the question as to whether the person to whom the negligent servant was lent had exclusive authority over him for the particular service must be left to the jury: *Waddock v. Winfield* (8); *Union Steamship Co. v. Claridge* (9). Regulation 10,

(1) Unreported.

(2) [1893] A. C. 308.

(3) [1891] A. C. 371.

(4) [1893] 1 Q. B. 629.

(5) 2 C. P. D. 205.

(6) 2 T. L. R. 781.

(7) 12 T. L. R. 611.

(8) [1901] 2 K. B. 596.

(9) [1894] A. C. 185.

as to the use of cranes, does not absolve the Harbour Commissioners from liability in the present case. It applies to an improper use by the shipowner or his employees, *e.g.*, by overloading it.

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Gordon, K.C., and Bates, K.C. (with them The Right Hon. James H. Campbell, K.C., and James Andrews), for the defendants:—

If *Donovan v. Laing* (1) is still law, the defendants were entitled to a direction. We have a long series of cases from *Rourke v. White Moss Colliery Co.* (2) down to *Donovan v. Laing* (1), all pointing in the same direction. These were cited in *The Union Co. v. Claridge* (3), before the Privy Council, without a word of dissent. Not one of the cases cited from the "Times Law Reports" got into the authorized reports, or are cited in any of the cases reported there. Nor is there any attempt even in them to throw doubt on *Donovan v. Laing* (1). It never could be the law that in order to transfer the servant from the general master to the special one for a special work, the latter should have power of summary dismissal. In none of the cases is there any suggestion that the transferee should have such power.

What Lord Esher meant in his judgment in *Donovan v. Laing* (1) (at p. 632) was that the transferee had power to stop the special employment. The accident might have occurred either through the incompetence or the negligence of the craneman. There was no evidence of incompetence, and the negligence (if any) was in doing the work which the owner of the ship directed him to do. "By the employer is meant the person who has a right at the moment to control the doing of the work": *per Bowen, L.J.* (4); and he says that was the test laid down for forty years. You cannot split the authority given to the transferee. For the purpose of unloading, Duffy was under the control of the hirer. There was no question for the jury on this point. In *Jones v. Scullard* (5), where the owner of a horse and brougham hired a coachman from a livery-stable-keeper, and was held liable for an accident arising from the negligence of the coachman while

(1) [1893] 1 Q. B. 629.

(2) 2 C. P. D. 205.

(3) [1894] A. C. 186.

(4) [1893] 1 Q. B. 634.

(5) [1898] 2 Q. B. 565.

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driving the brougham, Lord Russell of Killowen, C.J., not only cited *Rourke v. White Moss Colliery Co.* (1), and *Donovan v. Laing* (2), but based his judgment upon the principle of those cases. In *Waldock v. Winfield* (3) those cases, though distinguished, met with no disapproval from either Vaughan Williams, L.J., or Stirling, L.J. In *Cameron v. Nystrom* (4), Gellatly, the man who caused the injuries, was the servant of the stevedores. There was no common employment. We, of course, do not dispute the doctrine of *Johnson v. Lindsay* (5), but it has no application here. In *Dewar v. Tasker* (6) the hirer of the engine could only direct where it was to go, and what it was to draw. The driver was selected, paid, and liable to dismissal by the owners of the engine: *Cahalane v. North Metropolitan Railway and Canal Co.* (7) only comes to this, that there may be a question for the jury as to the right of the transferors to interfere in the operation. To attach liability to the Harbour Commissioners there must have been incompetence in Duffy. Once they sent a competent man to work the crane, their duty was discharged. For the operation of unloading Chambers, the master of ship, had absolute control over Duffy, and the shipowner would be liable for any negligence on his part.

Unloading a vessel requires the immediate control of somebody. That is pointed out by Lord Esher in *Donovan v. Laing* (2) (p. 631), and by Lord Watson in *Union Steamship Co. v. Claridge* (8) (p. 188) and by Vaughan Williams, L.J., in *Waldock v. Winfield* (3) (pp. 603, 604).

Williamson, in reply:—

There was no question as to who was the employer in *Donovan v. Laing* (2) or in *M'Fadden's Case* (9). It was otherwise in the cases cited from the "Times Law Reports." In *Jones v. Scullard* (10) Lord Russell found as a matter of fact that the servant had been

(1) 2 C. P. D. 205.

(2) [1893] 1 Q. B. 629.

(3) [1901] 2 K. B. 596.

(4) [1893] A. C. 308.

(5) [1891] A. C. 371.

(6) 23 T. L. R. 259.

(7) 12 T. L. R. 611.

(8) [1894] A. C. 185.

(9) Unreported.

(10) [1898] 2 Q. B. 565.

transferred from the keeper of the livery stable to the owner of the brougham. Sections 21 and 22 of the Harbours and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), are incorporated in section 5 of the Belfast Harbour Act, 1847 (10 & 11 Vict. c. lii.). The shipmaster had no power to dismiss Duffy or to substitute a craneman of his own choosing. All that could be done would be to direct him to cease working, in which case the unloading of the ship would be at a standstill.

The evidence of Mr. Jacob W. Keenan shows that even if the master objected to a particular craneman as unskilful or negligent, it did not follow that the Commissioners would replace him by a more competent person, [Counsel also referred to the evidence of Brereton and Burke.] The persons in charge of the unloading may give the signal to start, but they have nothing to do with the manipulation of the crane. The real question in the case is, whose servant was Duffy at the time of the occurrence; and the answer is clear, that he was the servant of the defendants.

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The judgment of the Court was delivered by Holmes, L.J. :—

Dec. 20.

In this action, brought to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of a servant of the defendants, the relevant facts are few and simple. The defendants are given by statute the control and regulation of Belfast Harbour, with all the piers, docks, wharves, and quays belonging thereto. It is their duty to assign a berth to a vessel that is to be loaded or discharged in the port, and to supply a crane on hire, if it is required for this purpose. In or about the 25th January, 1908, three schooners carrying cargoes of what are called square setts came from Annalong into the Clarendon Dock, Belfast, one of the docks within the jurisdiction of the defendants. There is no question that these vessels were lawfully entitled to discharge their cargoes there; and the master of each of them hired a crane for this purpose from the defendants. The terms of hiring are shown by a document, containing a request from the master to be allowed the use of the 1-2 tons steam crane to unload his vessel, subject to the usual rates and regulations relating thereto, and an agreement by the master to be responsible

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for all loss or damage which may arise from any improper use of the crane during the time it is so engaged. This is followed by a memorandum addressed to the harbour master by the defendants' officer, saying that the hirer is entitled to have his vessel placed in the crane-berth in regular turn. Concurrently therewith, an instruction is given to the crane-keeper that the hirer is entitled to use the crane to unload. The crane thus supplied is in charge of and worked by a servant of the defendants, who is appointed, paid, and can only be dismissed by them. In the case of these ships from Annalong, the cargo was to be discharged by means of buckets capable of holding 4 cwt. let down into the hold of the vessel, and, when filled there by the hirer's servants, taken up again and emptied on the quay. It is, I think, clear from the evidence on both sides that when a crane is hired, it is put in position by the defendants, and that the hirer adjusts the vessel to the crane as so placed. The witnesses say that it is easier to move the ship than the crane; and in this case, the ship was shifted so as to bring the hatch under the jib; but this had no connexion with the accident. There is no controversy that once the crane and ship are thus brought into position, the buckets are filled and emptied by the hirer's servants, one of whom directs by signal or voice the craneman to raise and lower the bucket and to swing round the arm of the jib. It is, I think, equally clear that it is the duty of the craneman to get up the steam by which the crane is worked, to regulate the speed of the descent and ascent by means of a brake, and, in the words of one of the defendants' witnesses, to manipulate the machinery. The accident occurred when the "Busy Bee," one of the three Annalong ships, was being discharged; and the plaintiff, although he belonged to another of these vessels, was, in accordance with an arrangement between their respective masters, assisting in the discharge. He was in the hold, helping to fill the buckets; and the first having been thus filled, was taken up by the crane. The men then began to fill the second; and the plaintiff when thus employed was struck on the back with great violence by the first coming back. Several witnesses say that no order or signal for its descent was given by anyone on behalf of the hirer. They were contradicted on this point by the craneman, but as this

is not the act of negligence found by the jury, the difference in the evidence is immaterial. There is abundant evidence that the bucket came down with a "crash," or "rush," or "bang." The craneman says that it ought to be lowered gradually; and the object of the brake which is worked by him is to control the speed of the bucket. The jury found that the bucket got out of the control of the craneman in its descent, that this was the result of his negligence, and that such negligence was the cause of the accident. The jury were then directed to assess the damages; and Madden, J., gave judgment for the sum thus ascertained. The question in this appeal is whether he was right; and I propose to consider it in the first place by applying to the findings and to the admitted facts well-known legal principles, without reference to any previous decisions. That the craneman was the servant of the defendants in the ordinary sense of the word before and during the hiring cannot I think be denied. Let me apply to the case the ordinary tests. He was appointed and paid by them, and they alone could dismiss him. They could at any moment during the discharge of the vessel remove him from the crane and put another man in his place; and although it was part of the agreement that the hirer was to direct him as to the time of raising and lowering the buckets, obedience to these directions could only be enforced by the defendants. If the hirer found him careless or incompetent, the sole remedy was to apply to the Harbour Commissioners, who on receiving such complaint might or might not take action thereon towards their own servant. The view of the case presented by the defendants' counsel, as I understand it, is that, from the time of the hiring until the discharge was finished, the hirer had complete control over the craneman and the crane; but this is not the inference from the evidence. It seems clear that the discharge was the joint work of both parties. The defendants were to supply the crane with a man in charge of it, who when the hirer's servants filled the buckets in the hold was to put the crane in motion, so as to raise and place them on the quay, and to return them when emptied for another load. In this operation the hirer can exercise no control over the defendants' servant. It is admitted by their counsel that the agreement of the hirer to be responsible for all loss or damage

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which may arise from any improper use of the crane during the time it is engaged in unloading is merely a contract to indemnify as between the parties, and would afford no defence to an action by a stranger who had been injured by the negligence of the defendants' servant in working the crane.

If this be so, I do not see how it would afford a defence to the action of the plaintiff, who is not concerned in the mutual rights and liabilities of the contracting parties. I am, therefore, not called on to construe the terms of the agreement to which I have referred; but if I were, I would hesitate to hold that such negligence as has been established in this case would be "an improper use of the crane" within its meaning. I should be more disposed to confine those words to any improper use of the crane by the hirer or his servants. It is admitted that the defendants were bound to supply a crane free from defects, and a skilled man to manage it. I am unable to see why they were not bound to provide a man who would manage it with reasonable care. It has been held on authority which binds this Court that men in the respective positions of the craneman and the plaintiff are not fellow-servants; and, having considered all the circumstances proved and admitted, I find nothing to distinguish this case from those actions with which we are familiar, where a plaintiff recovers damages from the master of a servant for personal injuries caused by the negligence of that servant in the work which he was employed to do. Therefore, in the absence of coercive authority to the contrary, I am prepared to restore the judgment of Mr. Justice Madden. We are, however, told by the defendants' counsel that such authority exists in *Donovan v. Laing* (1), in the English Court of Appeal, which they say cannot be distinguished from the present case. It is true that, although we are not technically bound by decisions in the co-ordinate English Court, we have been in the habit, in adjudicating on questions as to which the law of the two countries is identical, to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English Court, and leave error, if there be

(1) [1893] 1 Q. B. 629.

error, to be corrected by the tribunal whose judgment is final on both sides of the Channel. *Donovan v. Laing* (1) is undoubtedly similar in many of its facts to the case now under consideration. The defendants therein were owners of a crane, and they contracted with a firm of wharfingers to supply them with the crane and a man to work it whenever the firm would require it for loading or unloading ships at their wharf. The man sent in charge of the crane worked it in conformity with directions received from the firm or their servants; and, on the occasion of the accident complained of, the person who gave these directions was injured by the negligence of the craneman causing the crane to swing round towards the wharf without waiting for the necessary signal. This act of negligence was no doubt different from that found here; but I doubt if this difference is important. A more serious distinction, however, is that mentioned by Lord Esher, in the words—"If they [the wharfingers] saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment." If this means that the wharfingers could dismiss him and put another man selected by themselves in his place, the two cases are quite distinguishable; but from other observations of the Judges I doubt if this is what is meant. It is more likely that Lord Esher was contemplating that the wharfingers could send away the crane from their premises, and hire another from another crane-owner. But even this would differ from the case now under consideration, for no one other than the defendants has a right to hire out cranes for the discharge of vessels in Belfast Harbour. The case of *Donovan v. Laing* (1) has a curious history in this country. At the Belfast Spring Assizes, 1903, I tried with the assistance of a jury an action brought by a man called M'Fadden against the defendants, the facts of which were almost identical with those now before us. The plaintiff's counsel were evidently afraid of *Donovan v. Laing* (1), and the evidence was principally directed to show that the accident was caused by a defect in the crane; but the jury found against the plaintiff on this issue, while finding

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that it arose from the negligence of the defendants' servant who worked the crane. Thereupon I was asked for a direction on the authority of *Donovan v. Laing* (1), and as no other decision was referred to, and no serious attempt was made to distinguish the two cases, I gave judgment for the defendants, but I had damages assessed with a view to an appeal.

The case was brought into the Divisional Court, which seems to have affirmed my judgment, probably for the same reasons; and no further step was taken.

I presume that the present action was much more fully discussed before Madden, J., and in the Divisional Court; but that Court, in accordance with its rule, felt itself bound by its former decision. It has now come before us, and much additional light has been thrown on *Donovan v. Laing* (1). The judgment therein followed, and was to a considerable extent rested on, *Rourke v. White Moss Colliery Co.* (2), which certainly supports the conclusion arrived at. But we have been referred to three cases in the English Court of Appeal—*Moore v. Palmer* (3); *Cahalane v. Metropolitan Railway Co.* (4), and *Dewar v. Tasker and Sons* (5). The first of these cases was decided before *Donovan v. Laing* (1), the other two afterwards; and none of them appears in the authorized Reports; but the *Times* report of them seems accurate. It would be an unprofitable task to go through the facts of these cases. It is enough for me to say that I am unable to reconcile the decisions therein with *Donovan v. Laing* (1) as I understood that case when I heard *M'Fadden v. Belfast Harbour Commissioners* (6). In the circumstances, the Court thinks that it is bound to exercise an independent judgment on the facts found and admitted, with the result that, for the reasons stated, the appeal is to be allowed, and the judgment of Madden, J., restored.

Solicitor for the plaintiff: *Edward Cooksey.*

Solicitor for the defendants: *Edward Bates.*

W. G.

(1) [1893] 1 Q. B. 629.

(2) 2 C. P. Div. 205.

(3) 2 T. L. R. 781.

(4) 12 T. L. R. 611.

(5) 23 T. L. R. 259.

(6) Unreported.

ROBERT ANDERSON, APPELLANT; BLAYNEY R. T. BALFOUR, RESPONDENT (I). *Appeal.*
1910.

June 3, 6.

Employer and workman—Compensation—Accident—Gamekeeper—Injuries resulting from attack of poachers—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

A gamekeeper, whilst engaged in the discharge of his duties, was attacked and beaten by poachers, as a result of which he was injured.

Held (by the Lord Chancellor and Holmes, L.J., Cherry, L.J., dissenting), that this was a case of personal injury by accident within the meaning of the Workmen's Compensation Act, 1906.

APPEAL by the applicant from a decision of the County Court Judge of Louth, dismissing the applicant's claim for compensation for personal injuries received by him during his employment as gamekeeper by the respondent on the night of 1st September, 1909. It was part of the duties of the applicant to keep poachers off his employer's lands, and whilst so employed the applicant was on the night in question attacked by three men, who knocked him down, and jumped on his chest several times, causing injuries.

The County Court Judge reported that he was of opinion that the occurrence did arise out of and in the course of the applicant's employment as gamekeeper, but that it was not an accident within the meaning of the statute, and he accordingly dismissed the application.

T. S. McCann, K.C. (A. A. Dickie with him), for the appellant:—

The applicant is entitled to compensation. The injuries were caused by an "accident" within the meaning of section 1, subsect. 1, of the Act of 1906, and the occurrence admittedly arose out of and in the course of the applicant's employment as a

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

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gamekeeper. That the injuries were caused by the wilful and wrongful acts of the poachers is immaterial: *Challis v. London and South-Western Railway Company* (1). *Collins v. Collins* (2) is in favour of my contention, as the only ground on which the applicant in that case was refused compensation was that the occurrence did not arise out of his employment; the judgments proceed on the basis of the occurrence being an accident.

Hanna, for the respondent:—

The applicant's injuries were not caused by an accident, but resulted from a deliberate and unlawful attack by the poachers. The occurrence was not, in the words of Lord Macnaghten in *Fenton v. Thorley* (3), an unlooked-for mishap, or an untoward event which was not expected or designed, or what Lord Lindley, in the same case, defined as "any unintended and unexpected occurrence." To hold that this was an accident would be tantamount to deleting the words "by accident" from the first sub-section of section 1 of the Act. The case is ruled by *Collins v. Collins* (2). In *Challis v. London and South-Western Railway Company* (1) it was not contended that there was not an accident; the question there was whether the accident arose out of the employment. [Counsel also referred to *Armitage v. Lancashire and Yorkshire Railway Company* (4); *Stewart v. Wilsons and Clyde Coal Company* (5); and *Ismay, Imrie, and Co. v. Williamson* (6).]

THE LORD CHANCELLOR:—

This was an application for compensation under the Workmen's Compensation Act, 1906.

The applicant on the 1st September, 1909, was a gamekeeper in the employment of Mr. Balfour. It was part of his duty to keep off poachers from the woods of Mr. Balfour at night, and protect the game therein. While discharging this duty on the night of 1st September, he was attacked by three poachers, who inflicted injuries upon him. The County Court Judge found that the

(1) [1905] 2 K. B. 154.

(2) [1907] 2 I. R. 104.

(3) [1903] A. C. 443.

(4) [1902] 2 K. B. 178.

(5) [1902] 5 F. 120.

(6) [1908] A. C. 437.

occurrence did arise out of and in the course of the applicant's employment as gamekeeper, but that it was not an accident within the meaning of the statute, and accordingly dismissed the application.

The applicant appealed, and the appeal raises the net question whether though the injury happened to him in the course of his employment, and by reason of it, he is excluded from the benefit of the statute because the act of the poachers was a criminal one, and wilful and intentional, and therefore necessarily prevents the injury being one by "accident" within the meaning of the statute.

The words which we have to construe are, "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation."

Well, we have personal injury caused; it was caused while he was employed, and because he was employed in the duty he was bound to perform, and *prima facie* it would seem that every condition had happened which would entitle him to compensation; and none of the disqualifications mentioned in the provisoes engrafted on section 1 apply.

Having regard to the paramount intention of the statute as found by Lord Macnaghten, in its title and the enacting words, it has been held that where a workman in the ordinary course of his work did an act deliberately, having nothing of the element of haphazard about it, such as injuring himself by over-exertion, this was still an injury by accident. Lord Macnaghten says, in his judgment in *Fenton v. Thorley* (1): "The truth is that in the Act, which does not seem to have had the benefit of careful revision, 'accident' and 'injury,' that is, injury by accident, appear to be used as convertible terms; for instance, in section 2, 'notice of the accident' has to be given, and that notice is referred to immediately afterwards as 'notice in respect of an injury under the Act.' I come therefore to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-

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(1) [1903] A. C., at p. 448.

Appeal. for mishap or an untoward event which is not expected or
 1910. designed."

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In the Scotch case of *Stewart v. Wilsons and Clyde Coal Company* (1), Lord M'Laren said it was impossible to limit the scope of the statute. He considered that, "If a workman in the reasonable performance of his duties sustains a physical injury as the result of the work he is engaged in, this is accidental injury in the sense of the statute."

Those decisions give an interpretation to accident wide enough to cover even the present case. The word "accident" in its primary meaning, and having regard to its etymology, means, or at all events may mean, something happening.

But the case of *Challis v. London and South-Western Railway Co.* (2), while equally departing from the idea of accident only applying to something of a haphazard character, was decided upon facts singularly like those of the present case, and involves a principle which, in my opinion, governs it. There, a mischievous boy, standing on Merton Road Bridge, wilfully dropped a stone on the engine of a train which was passing under the bridge, which broke the eye-glass of the driver's cab on the engine, with the result that fragments of the broken glass were driven into his eyes. He died some months afterwards, and there was conflicting evidence as to whether the death was the result of the accident. The County Court Judge did not decide this point, as he held that the injury to the deceased, being the result of a wilful and intentional act on the part of the boy who dropped the stone, could not be said to have been an accident coming within the Act. The Court of Appeal differed on this point from the County Court Judge. Lord Collins says:—"He appears to me to have decided that, as the stone was wilfully dropped, it was an intentional act, and, therefore, there could not be said to have been an accident. I think that the Judge was wrong in so holding. I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it."

[(1) [1902] 5 F. 120.

(2) [1905] 2 K. B. 154.

He then goes on to consider whether it was an accident which arose out of and in the course of the employment, and came to the conclusion as a fact that it was a risk incidental to it, looking to the habits of mischievous boys. Both Lord Justice Mathew and Lord Justice Cozens-Hardy expressed the same view as Lord Collins on the point whether the case was an accident within the Act, though it was the result of a tortious act wilfully committed by the boy. It is important also to notice that section 13 of the Act excludes from the definition of workman a member of the police force, thus implying that otherwise he could claim compensation.

In the present case the difficulty as to whether the accident arose out of and in the course of the employment does not arise.

In the case of *Collins v. Collins* (1), while adopting the decision in *Challis v. London and South-Western Railway Co.* (2) as correct, we differentiated it, because the injury—the stabbing—occurred in the course of an assault made by a drunken rowdy on the workman which did not arise out of the employment.

The case of *Ismay, Imrie, & Co. v. Williamson* (3) is, I think, only valuable for the purposes of the present case because the majority of the Law Lords adopted and approved of the decision in *Fenton v. Thorley* (4).

Having regard to the interpretation given to the word “accident” in those cases of great authority, and the finding of the County Court Judge that the injury arose out of the employment, I think he was wrong in finding that the injury was not an accident. This is purely a question of law. In my opinion we should allow the appeal, and remit the case to the County Court Judge, with a declaration that the occurrence was an accident within the meaning of the statute.

HOLMES, L.J.:—

The appellant, who had been the respondent's gamekeeper, proved at the hearing before the County Court Judge that it was one of his duties to keep poachers off the preserved lands, and

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Chancellor.

(1) [1907] 2 Ir. R. 104.

(2) [1905] 2 K. B. 154.

(3) [1908] A. C. 437.

(4) [1903] A. C. 433.

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that, when engaged in this duty on the night of the 1st September last, he was attacked by three men, who knocked him down, and jumped upon his chest several times. I gather from the Judge's report that he accepted this evidence; and although he has expressed no opinion as to whether the personal injuries which the appellant alleges resulted from this assault were serious or trifling, I assume that he would have awarded some compensation for them if he had thought that they were within the provisions of the Act. He held, however, that although the occurrence arose out of and in the course of the applicant's employment as game-keeper, it was not an accident within the meaning of the statute. The first of these findings reduces the second to a pure question of law. The Judge could not have drawn the inference that the attack on the appellant arose out of his employment, unless he was satisfied that it did not originate from ill-will unconnected with the applicant's duties, and was not provoked by some impropriety or misfeasance in the mode in which the duties were performed. Judge Green must have thought that the cause of the occurrence was the hostility with which poachers regard the person who is employed to prevent them interfering with the game; and that if it had not been for his position as keeper, he would have gone on his way on that September night unmolested and uninjured. It is a matter of common knowledge that this hostility exists, and that one of the risks attaching to the appellant's occupation is that the hostile feeling sometimes shows itself in acts of serious violence. The only point for decision in this appeal is whether an injury resulting from violence of this kind is to be compensated for under the Workmen's Compensation Act, 1906; and this depends upon whether such injury is an accident within the meaning to be given to that word in construing the first section. The question is of importance; but we have not been referred to any authority that affords much assistance in solving it, although it is one that must occasionally arise. Gamekeepers are not the only class interested in it. There are other employments in which servants are obliged as part of their duty to do things perfectly legal and necessary in themselves, and yet calculated to excite unreasonable anger in some of the persons with whom they come in contact. Ticket-collectors and porters in carrying out the byelaws of a railway

company are sometimes called on to remove a passenger from a carriage. Night watchmen in places of business may be obliged to expel forcibly unauthorized intruders, or even to arrest and detain thieves or other criminals. There are servants whose sole occupation is to prevent persons from trespassing on their master's property. We know that the faithful and proper performance of these duties occasionally subjects the men engaged in them to rough usage. If the exertions of the servant in carrying them out were to incapacitate him for his work by causing a strain or rupture, I do not doubt that he would be entitled to compensation, and it would be, I think, anomalous if he were held disentitled where the same result arose from a vicious kick or blow.

I now turn to the words of section 1 of the Act, "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation." The argument for the respondent is confined to the simple proposition that an injury caused by intentional violence is not an injury by accident. Now, if I were to substitute in the section quoted for the words "by accident arising out of" the words "by something that happened arising out of," it could hardly be denied that the present case would come within the description. Yet the change I have suggested merely converts a word of Latin derivation into an English equivalent, and is in accordance with the meaning of "accident" as used in our early literature, as well as with the special definition given in the Century Dictionary, "an undesirable or unfortunate happening."

I agree, however, that an assault would not now be called "an accident"; and that in modern language "accidental" is used in contrast with "intentional." But it does not follow that the present and the other cases I have suggested are not accidents within the meaning of the section. The statute deals with what are regarded as accidents from the point of view of master and servant; and when they are defined by Judges as something unforeseen, unexpected, and out of the usual or normal course of things, these words must be taken in connexion with the employment. Injuries from fire-damp and explosion are risks to which colliers are exposed; but where they occur, they are sudden and unlooked-for.

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When a man enters service as a gamekeeper, or as the worker of a saw-mill, neither he nor his employer expects that he will be incapacitated in the one case by the violence of poachers, or in the other by some oversight in dealing with the machinery. Men pass their lives in such employments without receiving any hurt arising therefrom; and it is only in an exceptional case that an injury is sustained.

It seems to me that it would be no less an accident for a gamekeeper to meet once in his career a poacher ferocious enough to attack, and expert enough to get the better of him, than for a sawyer on a single occasion to so lose his skill and presence of mind when at work as to have his arm or hand mutilated. I have said that we gain little help from previous decisions. The *Kerry Case* (1) that has been referred to differs from the present in the circumstance that it was found therein that the violence which led to the workman's death did not arise out of his employment.

This is the really critical matter, when an application for compensation is made in such circumstances as are now before us. A servant is sometimes attacked and injured in the course of his employment; but this is not enough. The attack must arise out of his employment; and it would be very difficult to establish this, unless there were something in the nature of his occupation that would expose him to the risk of attack.

This issue has been found by Judge Green in favour of the applicant; and it is not disputed that there is evidence to support the finding. For these reasons, I am of opinion that the appeal ought to be allowed, and that the case should be sent back with a declaration that the injury was by accident within the meaning of the statute.

CHERRY, L.J. :—

I am sorry to say that I cannot concur in the view of the other members of the Court, and however much I may distrust my own opinion, having regard to the judgments which have just been delivered, I feel bound to state, as briefly as possible, the

(1) [1907] 2 I. R. 104.

conclusions, in point of law, at which I have arrived, and the grounds of them.

Two questions arise in the case—(1) Whether the injuries sustained by the claimant were occasioned by accident; and (2) whether they arose out of and in the course of the employment. These two questions are quite distinct, and upon both I agree with the findings of the County Court Judge.

The applicant was a gamekeeper, and while engaged in the discharge of his duties as such, he was, at about 10.30 p.m. one night, attacked by three men, who knocked him down, and jumped on his chest several times. The effect of this beating, which was of course deliberate and intentional, was to produce weak action of the heart, and for this he claims compensation under the Act.

We have now to determine whether the injuries thus inflicted can be properly described as "personal injury by accident" within the meaning of the Act.

In the leading case of *Fenton v. Thorley* (1) it has been laid down by the House of Lords that the word "accident" in the Workmen's Compensation Acts is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. These are the actual words of Lord Macnaghten (p. 448); and those of Lord Lindley are to the same effect; "the word 'accident,'" says he, "is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any *unintended* and unexpected occurrence which produces hurt or loss. But it is often used to denote any *unintended* and unexpected loss or hurt apart from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other *unintended* and *unexpected* events" (p. 453). It would appear from the last

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(1) [1903] A. C. 443.

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sentence, that in the view of the noble Lord, an absence of intention to produce the particular injury inflicted is an essential element of an "accident" whether one uses that word as applying to the cause, or the effect, or both combined.

Now, does not this view exactly correspond with the popular and ordinary use of the term? Would anyone, not a lawyer, say that a gamekeeper who was badly beaten by poachers met with an accident? In the everyday language of educated people an effect is said to be "accidental" when, and only when, the act by which it is caused is not done with the intention of causing it. I have looked into several dictionaries of repute, and I find that in all of them, this absence of design or intention is included in the definition of the word "accident." In one of them it is defined as, "an unforeseen and undesigned injury to a person"; in another, as, "an undesigned harm or injury," and, more generally as "a happening without intentional causation." The term "accident" is used as the converse of design, in the ordinary language of the man in the street.

Mr. M'Cann, however, relies very strongly and very properly upon the case of *Challis v. London and South-Western Railway Company* (1), and at first sight it seems difficult to reconcile this decision with the views I have expressed. There it was proved that a stone, wilfully dropped by a mischievous boy from a bridge upon a train passing underneath, struck and broke the eye-glass of the driver's cab on the engine, the result being that the driver's face was cut, and fragments of the broken glass were driven into his eyes. It was held by the Court of Appeal that these injuries gave rise to a claim for compensation under the Act. Indeed it was not even contended by the respondents that there was not an accident, the only question raised being whether the accident was one arising out of and in the course of the employment. One passage in the judgment of Collins, M.R., goes very far to support the contention of the appellant here. Speaking of the decision of the Court below, he says that the County Court Judge "appears to me to have decided that, as the stone was wilfully dropped, it was an intentional act, and, therefore, there could not

(1) [1905] 2 K. B. 154.

be said to have been an accident. I think (he adds) that the Judge was wrong in so holding. I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it."

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This undoubtedly would seem to imply that an intention to produce a certain result is not inconsistent with that result being considered an accident; but every judgment must be read having regard to the particular facts of the case before the Court for decision; and all, as it appears to me, that the learned Judge meant to convey was, that although the boy who dropped the stone might be deemed to have intended the injury produced, upon the ground that a person is deemed in law to intend the natural consequences of his acts, yet the particular injury suffered by the engine-driver was not either foreseen or designed by him, and therefore should be considered an accident. In ordinary language it would undoubtedly be so described. The boy when dropping the stone from the bridge was most probably not thinking of the engine-driver at all, and certainly did not consider the risk of broken glass entering his eye. Therefore this result, an unforeseen and undesigned injury, might properly even in strictly legal phraseology be described as an accident; in the words of Lord Macnaghten, "an untoward event," "not expected or designed."

But can the same be said of injury sustained by a gamekeeper caused when deliberately attacked by poachers? Surely the injuries caused by their acts cannot be said to be either unforeseen or undesigned. Would any ordinary person say that the gamekeeper's injuries were produced by accident? If the question were asked, the answer would almost certainly be, "No, the man was deliberately attacked and beaten." In my opinion, the answer in law ought to be the same. I do not think that the case is governed by the decision in *Challis v. London and South-Western Railway Co.* (1), because in that case the particular injury suffered was not desired or foreseen by the person whose act was the remote cause of it,

(1) [1905] 2 K. B. 154.

Appeal. while here I have no doubt that an intention to injure the game-
1910. keeper—possibly to kill him—was present in the minds of his
ANDERSON assailants throughout the occurrence.
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BALFOUR. Whether, therefore, we apply the test of ordinary language,
Cherry, L.J. or the principles laid down by the House of Lords in *Fenton v. Thornley* (1), we ought not, I think, to hold that the injuries sustained by the applicant in this case were due to accident. If that be so, it becomes unnecessary to consider the second question, namely, whether they arose out of and in the course of his employment. But, upon the answer to that question, I concur in the view of the other members of the Court and the County Court Judge. Having arrived at the conclusion, however, that there was no accident, I cannot, I regret to say, concur in the order of this Court.

Solicitor for the appellant: *J. H. M'Cann.*

Solicitor for the respondent: *J. G. M'Keever.*

R. ST. J. C.

ISABELLA SCOTT v. BROOKFIELD LINEN
COMPANY, LIMITED (1).

K. B. Div.

1909.

June 18, 21.

(1909. No. 1181.)

*Factory and Workshop Act, 1901, s. 10 (c) (d)—Dangerous parts of machinery
—Fencing.*

The obligations imposed on owners of factories by clauses (c) and (d) of section 10 of the Factory and Workshop Act, 1901, are different in character. The obligation imposed by clause (c) is a continuing obligation, and applies to all times, even when the machine is under repair, examination, or exposure, as mentioned in clause (d), and is one requiring the owners of the factory to fence all dangerous parts of their machinery in such a manner as will be capable of ensuring the safety of the workers as far as is reasonably practicable, having regard to the exigencies of such repair, examination, or exposure; whereas the obligation under clause (d) applies to periods when the machinery is not under repair, examination, or exposure, and is an obligation to maintain the fencing in an efficient state, or, in other words, in such a state as will be capable of ensuring the safety of the workers.

The owners of a factory are under a statutory obligation by virtue of section 10 of the Factory and Workshop Act, 1901, to securely fence all dangerous parts of their machinery in order to protect their workers, but are exempt from maintaining such fencing in an efficient state while the parts required to be fenced are under repair; and where, in breach of such statutory duty, they fail to provide any fencing for such machinery, and a worker is injured through a dangerous part of such machinery not being fenced while undergoing repairs, they cannot escape liability on the ground that the *causa causans* of the plaintiff's injury was not the omission to provide the fencing, but to maintain it, and that consequently, although there may have been a breach of the obligation to provide the fencing, such breach was not the cause of the injury received by the worker from such machine while under repair.

MOTION on behalf of the defendants to set aside the verdict, and to enter judgment for the defendants, or in the alternative for a new trial.

The action was tried before Madden, J., and a common jury at Belfast on the 23rd and 24th days of March, 1909.

(1) Before PALLES, C.B., and JOHNSON, J.

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The plaintiff, in her statement of claim, alleged as follows :—

“ 1. The plaintiff, on the 22nd day of January, 1909, was employed as a weaver by the defendants in their factory at Brookfield, Belfast, near a loom driven by steam power.

“ 2. In respect of the said loom, the defendants were bound by section 10 of the Factory and Workshop Act, 1901, to have all dangerous parts of said loom either securely fenced or in such position and of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced.

“ 3. The defendants were guilty of a breach of the statutory duty pleaded in paragraph 2.

“ 4. The said loom was defective, as the defendants well knew, but the plaintiff did not know.

“ 5. In consequence of the said breach of statutory duty and negligence on the part of the defendants, the plaintiff, on the 22nd day of January, 1909, was injured by a shuttle in its flight from the said loom, and lost the sight of one eye, and suffered serious injuries to her other eye and great pain, and was permanently incapacitated for work.

“ The plaintiff claims £1000.”

The defendants delivered the following defence :—

“ 1. The defendants deny that the said loom was driven by steam power at the time of the alleged accident, or at all.

“ 2. The defendants deny that they were under the duty alleged in paragraph 2 of the statement of claim, or that they were guilty of the alleged or any breach of statutory duty.

“ 3. The defendants say that at the time of the happening of the alleged accident the parts of the said loom which it is alleged were wrongfully left unfenced, were under repair or under examination in connexion with repair, or were necessarily exposed for the purpose of cleaning or lubricating, or for altering the gearing or arrangements of the parts of the said loom, and they rely upon the provisions of section 10 (c) (d) of the said Factory and Workshop Act, 1901.

“ 4. The defendants deny that the said loom was defective, or

that they knew that the same was defective, or that the plaintiff did not know. K. B. Div.
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"5. The defendants deny that the plaintiff was injured in the manner alleged in paragraph 5 of the said statement of claim, or at all, or that the plaintiff sustained the alleged or any injury or damage. SCOTT
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"6. The defendants deny that they were guilty of the alleged or any negligence.

"7. It was not by reason of the alleged or any breach of statutory duty or negligence that the plaintiff sustained the alleged or any injury or damage.

"8. There was contributory negligence on the part of the plaintiff.

"9. The injuries complained of, if any, were caused solely by reason of the negligence on the part of the plaintiff.

"10. The plaintiff was, at the date of the alleged accident, a servant in the employment of the defendants, and the injuries to the plaintiff in the statement of claim complained of were caused by certain other servants of the defendants in a common employment with the plaintiff, and solely by their negligence and not by the negligence of the defendants personally.

"11. By way of further defence, the defendants say that the employment upon which the plaintiff was engaged at the date of the alleged accident was a dangerous employment; that the plaintiff knew of and appreciated the risk and danger of the said employment, and in particular knew of any insecure or insufficient fencing of the said loom, yet the plaintiff voluntarily contracted or consented and undertook to run the risk of the said employment, and of any insecure or insufficient fencing of the said loom."

The plaintiff joined issue on this defence, and gave the following answer to the defendants' notice for particulars:—

"1. The defendants failed to fence with safe-guards the wings or sides of the loom from which the shuttle struck the plaintiff, as they were bound to do by section 10 of the Factory and Workshop Act, 1901.

K. B. Div. "2. The said loom was defective through the absence of such
 1909. guards.

SCOTT "3. The said loom was defective in and about that portion of
v. same from which the said shuttle started, as defendants were well
BROOKFIELD aware.
LINEN CO.

"4. The repairs necessary to make good the said defective condition mentioned in paragraph 3 were not done.

"5. The repairs necessary to make good the said defective condition were negligently done.

"6. The defendants neglected to provide competent workmen to execute the said repairs.

"7. The plaintiff will also rely on such facts in proof of said breach of statutory duty and negligence as are in the knowledge of the defendants but not of the plaintiff, and appear in evidence at the hearing of the action."

The jury answered the questions put to them by the Judge as follows :—

1. Were the defendants negligent by reason of providing an imperfect or defective machine? No.

2. (a) Was the loom dangerous machinery? Yes. (b) If so, was it securely fenced? No.

3. Were the injuries suffered by the plaintiff caused (a) By the imperfect or defective character of the machine? No. (b) By the fact that it was not securely fenced? Yes.

4. If not securely fenced, was the loom in such a position or of such construction as to be as safe as it would have been if it had been securely fenced? No.

5. Was the loom one in ordinary use in the factory and ordinarily driven by mechanical power? Yes.

6. Was it at the time of the accident under repair? Yes.

7. Was it at the time being driven by mechanical power or worked by hand? By hand.

8. Was it dangerous to work the loom during repair without taking precautions for the safety of the workers? Yes.

9. Were the defendants negligent in not taking such precautions, and if so, was such negligence the cause of the occurrence? Yes.

10. Did the plaintiff know and appreciate the danger in which she was placed? No. *K. B. Div.*
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11. Was she guilty of negligence or contributory negligence? No. *SCOTT*
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If you find for the plaintiff, assess damages? £450.

The Judge gave judgment for the plaintiff in the sum of £450 with costs, and stayed execution until the second day of the next sittings, and in the event of a notice of motion to set aside the verdict being served on or before that date, then until the hearing of such motion.

The Judge's notes of the trial showed that plaintiff gave evidence to the effect that while she was engaged in working at a loom in the defendants' factory, a mechanic named Martin, who was also in their employment, was engaged repairing an adjoining loom. In the course of such repair he started the loom without giving any warning, and a shuttle flew out of this loom and struck the plaintiff in the eye while she was working at her own loom. She was taken to hospital, and the eye had to be removed two days afterwards. There were no guards on the loom in question, and the mechanic had been attending to it for the two days previous on account of the shuttle flying out. On the third day previous to the accident in question the shuttle had flown out of the same loom, and hit the plaintiff; and another worker had been similarly hit on an earlier date by an escaping shuttle from the loom under repair. Expert evidence was given to show that the absence of guards on such looms was dangerous, and that circular box-looms were more liable to get out of order, and more complicated, than the ordinary looms. Plaintiff further gave evidence to show that there was intense noise and clatter in the mill, and that it was impossible to hear an ordinary voice.

The Judge refused the defendants' application to direct a verdict for them. The defendants then gave evidence to show that the loom under repair was worked by hand and not by steam at the time of the accident; that it was a common occurrence for a shuttle to fly out while the loom was being regulated; that warning was given to plaintiff; that shuttles fly out in all directions, and that no guard would afford complete protection against all shuttles flying out; that one guard between the end of two

K. B. Div. looms does for both, and that, since the accident, there was such
1909. guard between every alternate box-loom, except where there was
a passage between the looms, in which case a guard is put on
each side.

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At the close of the evidence, *Bates, K.C.*, for the defendants, handed in a written requisition as follows :—

The defendants apply for a direction on the grounds—
(1) That the negligence of the defendants (if any) was that of the plaintiff's fellow-servant; (2) that there was no breach of statutory duty, as at the time of the accident the loom was
(a) under repair, or examination in connexion with repair;
(b) not part of the factory, nor driven by mechanical power.

Counsel for the plaintiff contended—(1) That the exemption from the statutory obligation to fence during repairs applied only in a case where proper fencing had been supplied; (2) that there was evidence of non-compliance on the part of the defendants with a common law obligation.

The Judge was of opinion that, irrespective of the statutory obligation to fence, the owner of a machine which, when under repair, was a source of danger to persons in the neighbourhood, was bound to take reasonable precautions for the protection of persons lawfully present, whether working at the looms, or using the passage between them. His Lordship was also of opinion that there was evidence proper to be submitted to the jury that this obligation had not been performed as regards the loom from which the shuttle flew out, and that the negligence relied on by the plaintiff related to the construction and guarding of this loom, and had no reference to the working of it by the mechanic during repairs.

With the exception of the requisition, no objection was taken to the Judge's charge, or to the questions submitted to the jury.

In granting a stay of execution the Judge stated that it was not to be understood that he was dissatisfied with the findings of the jury.

Counsel for the defendants now moved to have the judgment and verdict set aside, and judgment entered for them; or, in the alternative, they asked for a new trial.

Bates, K.C., and Chambers, K.C. (with them Andrews), for K. B. Div. defendants. 1909.

Gordon, K.C., and W. Martin M'Grath (with them T. J. Campbell), for plaintiff. SCOTT v. BROOKFIELD LINEN Co.

The arguments appear fully from the judgment of the Court, which was delivered by Palles, C.B.

PALLES, C.B. :—

June 21.

This is an application to change the verdict for £450 had for the plaintiff, and the judgment entered thereon at the trial by Mr. Justice Madden, into a verdict and judgment for the defendants. The action is brought by a worker in a linen factory at Belfast against her employers, for damages for the loss of an eye, which was caused, as she alleges, through a breach of a statutory obligation of the defendants.

In the pleadings, and during the argument here, actionable negligence at common law was also relied on; but it is unnecessary to discuss any question in reference to it in consequence of the opinion I have formed upon the question of the defendants' statutory liability.

The defendants also seek, in the alternative, a new trial, in the event of our being of opinion that the defendants are not entitled to have judgment entered for them. The main contention in support of this part of the application was that the doctrine "*volenti non fit injuria*" applied; but as it was admitted that this doctrine does not apply to the cause of action dependent on statutory liability, it is unnecessary to discuss in detail this part of the application.

Thus, the only question which I propose to consider is that of the defendants' statutory obligation.

The injury complained of by the plaintiff was caused by a blow which she received upon the eye from a shuttle, which escaped from a loom called in the evidence a "box-loom," which was then being repaired by a mechanic named Martin, and which was one of a large number of looms then being worked in a shed of the defendants, in which the plaintiff was working at another loom adjoining this box-loom. It was proved that shuttles

K. B. Div. frequently escaped from box-looms whilst they were being
1909. worked; and that when they so escaped they flew distances far
SCOTT exceeding that of the space which intervened between the loom
v. at which the plaintiff was working and the adjoining box-loom.
BROOKFIELD To intercept these escaping shuttles in their course, it was usual
LINEN Co. to fence the looms by screens. On some of the looms there were
Palles, C.B. two screens, one at each side; but upon others, including the box-
loom I have referred to, there was but one. This was usually the
case when the looms closely adjoined each other.

The jury, upon evidence which, in my opinion, fully warranted the conclusions, found at the trial, *inter alia*, that the box-loom in question was dangerous machinery; that it was not securely fenced; that the plaintiff's injuries were caused by it not having been securely fenced; and that the loom was not in such a position or of such construction as to be as safe as it would have been if it were securely fenced.

The jury further found, and it is on this finding that the question arises, that the box-loom, at the time of the accident, was under repair; that it was then being driven by hand; that it was dangerous to work it during repair, without taking precautions for the safety of the workers; that the defendants were negligent in not taking such precautions; and that such negligence was the cause of the occurrence.

Under these circumstances, the liability of the defendants is rested by the plaintiff's counsel upon section 10 of the "Factory and Workshop Act, 1901" (1), clauses (c) and (d), which are in the following words:—

- (c) "All dangerous parts of the machinery, and every part of the mill-gearing, must either be securely fenced, or be in such a position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."
- (d) "All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair, or under examination in connexion with repair, or are necessarily

exposed for the purpose of cleaning or lubricating or for altering the gearing or arrangement of the parts of the machine." K. B. Div.
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The genesis of these clauses is to be found in section 21 of the Factories Act of 1844 (1), which was repealed by the Factory and Workshop Act, 1878 (2), the 5th section of which imposed an obligation more extensive than that of the Act of 1844; and this obligation, in its terms, was to a certain extent further extended by the Factory and Workshop Acts of 1891 and 1895, and by the Act now under consideration.

It seems clear that if the statute of 1901 did not contain clause (d) of the 10th section, and that the defendant's liability depended solely upon clause (c), read by itself, unaffected by any considerations arising from clause (d), the defendants would be liable. Indeed this is admitted. In that event, the facts found here by the jury would have shown a breach by the defendants of an obligation imposed for the safety of the workers, and an injury to the plaintiff, a worker, by reason of that breach of obligation; and it has been for years well settled that, in such a case, an injured worker is not restricted to the remedy given by the Act, but can sustain an action for recovery of damages for the injury.

The defendants, however, rightly insist that clause (c) cannot be taken by itself, and that in construing it we must take clause (d) into consideration. Clause (d) enacts that the fencing must be maintained in an efficient state, while the parts required to be fenced are in motion or use; except (*inter alia*) when they are under repair. At the time in question they were under repair; and, therefore, the defendants argue, and, as I think, rightly, that there was no obligation on them under clause (d) to then maintain the fencing in an efficient state.

They further, however, allege two things:—

1. That clause (d) shows that clause (c) does not impose any obligation to maintain the fencing; that, whatever may be its words, the effect of clause (d) is to except, out of (c), the obligation

(1) 7 & 8 Vict. c. 15.

(2) 41 Vict. c. 16.

K. B. Div. to maintain the fencing, as distinct from providing it, and
 1909. at least any obligation to provide fencing, during repair; and
 SCOTT that consequently the defendants were not under any liability to
 v. maintain any fencing at the time plaintiff was injured.
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2. They say that the *causa causans* of the plaintiff's injuries was, not the omission to provide the fencing, but to maintain it; and that consequently, although there may have been a breach of their obligation under clause (c), such breach of obligation was not the cause of the plaintiff's injuries.

It will be convenient, in the first instance, to dispose of the second argument. I am unable to hold that it is sound. To give effect to it, I should assume, as a matter of law, that had the screen been so provided, the defendants' servants would have removed it from its proper position whilst the repairs were in progress. I cannot assume this as a matter of law; nor, were I the tribunal of fact, which, of course, I am not, should I have held myself at liberty to draw an inference of fact to this effect. The nature of the repairs did not require the removal of the screen; the one screen which had been provided by the defendants had not been removed from the loom during the repairs, the mode in which the screens were attached to the looms was not proved; but, above all, as a removal of the screen during the work of repair would, undoubtedly, have been dangerous, to the knowledge of Martin, we ought not to assume that, had the screen been provided, he, contrary to his duty to his fellow-servants, would have knowingly exposed them to unnecessary danger, by the removal of the screen.

The first argument, however, is more important; and I have given to it much consideration. It seems strange that so important a question should not have previously arisen; but the diligence of counsel has not been able to discover any reported authority bearing upon it, nor am I myself aware of any case in which it has been discussed.

I have, however, been able to arrive at a clear conclusion as to the meaning and construction of these two clauses. I shall first take clause (c) by itself. Its frame is not that any prescribed person is to securely fence all dangerous parts of the machinery. Were that the obligation, it possibly might be

satisfied by the prescribed person doing the act so directed. The actual words of the clause relate, not to any person doing any act, but to the condition of the machine. They are in the passive: "All dangerous parts must be securely fenced." Words of this nature refer to an habitual and continuing state and condition of the machinery, which it seems impossible to satisfy by fencing being provided without being placed in such a position that the dangerous parts of the machinery shall thereby be securely fenced, or without such fencing being kept and continued in such a position as to form a secure fence. The "securely fencing" the machinery during an undefined period of time undoubtedly implies the maintaining the fencing, during the entire of such time, in such a position that it will securely fence the machinery.

I now come to clause (d). As to it, I have in the first place to observe that its concluding words, commencing, "except where they are under repair," plainly refer to (d) only, and not to (c); and that any construction which would have the effect of attributing them to clause (c), as well as to clause (d) would, *prima facie* at least, do violence to the words used.

The defendants say that this clause necessarily implies that there is no obligation whatsoever on the defendants whilst the parts of the machinery are under repair. During those periods, proved to be more dangerous than during ordinary working, there is not, defendants contend, any obligation to maintain fencing, even when it can be maintained without preventing or delaying the repairs, or even an obligation to use due care to fence as effectively as is reasonably possible during the repairs. I do not think so. The very utmost that can be implied is, that the fencing need not, during repair, necessarily be maintained in an efficient state. Now, unless there be some distinction between the obligation to "maintain securely fenced," and to "maintain fencing in an efficient state," there would be a plain contradiction between clauses (c) and (d); and a construction involving contradiction ought not to be unnecessarily resorted to. We must give such a construction to both clauses as will give some effect and operation to each, to (c) without limit of time; to (d) subject to the limit that it shall not apply during the period of repair, examination, or exposure mentioned in the section. This

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K. B. Div. construction is in my opinion found by giving due effect to
1909. the word "efficient," which seems to express the "differentia"
SCOTT between the obligation as to maintenance imposed by the two
v. clauses.
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LINEN Co.
Palles, C.B. This word, as I have said, does not occur in clause (c). Under
it, the "dangerous parts" are to be "securely fenced." Having
regard to the difficulty which is made apparent by clause (d), of
fencing during the periods of repair, examination, and exposure,
in the same efficient way as can be effected at other times, the
obligation imposed by (c) to "securely fence" must mean to
"securely fence" in a reasonable manner, having regard to the
exigencies and circumstances which were in the contemplation of
the Legislature; to fence in a manner which may be more effective
at one time than at another; more effective during the periods
while the machinery is not under repair, examination, or exposure,
than it would be during those latter periods.

In my opinion, then, the extent of the security which must be
afforded by the fencing is different under each of the two obli-
gations in question. Whilst the machinery is not under repair
or such examination or exposure as is mentioned in clause (d), the
obligation is to maintain in an efficient state; or, in other words,
in such a state as to be capable of effecting the intended object of
ensuring the safety of the workers. During the excepted periods
of repair, examination, or exposure, the obligation is under (c),
and, in my opinion, is to fence so as to ensure safety so far as is
reasonably practicable, having regard to the exigencies of such
repair, examination, or exposure; that is, having regard to the
fact that such operations may necessarily or reasonably involve
or require the removal of all or some part of the fencing.

In the present case, had the defendants provided a proper
screen, and had it been proved that it was necessary to remove it
for the purpose of repair, the case, in my opinion, would have
been wholly different. It is apparent, however, by reason of the
one screen provided having been allowed to continue, that the
removal of the other screen, had it been provided, would not have
been necessary for carrying out the repair in question. That it was
not necessary is, I think, substantially found by the answers of
the jury to the 8th and 9th questions left to them; and even

had it not been so found, I should have felt no difficulty in myself drawing an inference of fact to that effect.

For these reasons, I am of opinion that Mr. Justice Madden, upon the findings of the jury, rightly directed a verdict for the plaintiff for the damages assessed, £450, and that consequently the present motion is unsustainable, and should be refused with costs.

Solicitor for the plaintiff: *James Alexander.*

Solicitors for the defendants: *J. C. White & Co.*

J. M.

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ALFRED MATTHEWS (SURVEYOR OF TAXES), APPELLANT; *K. B. Div.*
THE CORK COUNTY COUNCIL, RESPONDENTS (1). 1910.

Revenue—Income Tax—County Council—Interest allowed on County funds
by bank as treasurer—County Treasurers (Ireland) Act, 1867 (30 & 31 Vict.
c. 46), s. 2—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sch. D.
April 29.
May 2, 17.

A County Council is assessable to income tax upon interest allowed by a bank for moneys from time to time lying to the credit of the county with the bank as treasurer of the county.

CASE STATED by the Commissioners for the special purposes of the Income Tax Acts. The case set out as follows:—

At a meeting of the Commissioners for the special purposes of the Income Tax Acts, held at the Inland Revenue Office, Cork, on 7th October, 1908, the Cork County Council (hereinafter called the respondents) appealed against an assessment under Schedule D, of the Income Tax Act, 1853, for the year ended 5th April, 1909, on the sum of £1792 in respect of interest of money.

The Munster and Leinster Bank, Limited, at Cork, is the treasurer of the Cork County Council, and the said sum of £1792 was arrived at as under:—

Interest allowed by the said Bank on the County Funds in its hands for—

(a) Half-year to 30th September, 1907,	£947	11	9
(b) „ „ 31st March, 1908	845	6	9

Total, £1792 18 6

(1) Before PALLES, C.B., and KENNY and WRIGHT, JJ.

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The accuracy of these figures was admitted, but it was contended on behalf of the respondents:—

(1) That under the Local Government Acts the County Council was a statutory authority, only having the management of the financial affairs of the county, but that the County Council could in no sense be said to be in receipt of the rates or other funds, or to have any property therein.

(2) That the County Council has not the position or the powers of a municipal or common law corporation: *vide* the judgment of Lord Halsbury in *London County Council v. Attorney-General* (1).

(3) That the county treasurer was an independent statutory authority. That all moneys were carried direct to the county fund, and that the treasurer alone has authority to give a quittance for moneys received, or to make payments thereout: *vide* section 3 of the County Treasurers (Ireland) Act, 1867, and section 47 of the Local Government (Ireland) Act, 1898.

(4) That the statutory authority vested in the council in respect of the subject-matter of the assessment by the County Treasurers Act, 1867, is to fix with the banking company appointed treasurer “the amount of interest to be allowed for money from time to time lying to the credit of the county,” but that the interest so allowed is not received or receivable by the council, and is not a profit or income of the council within the meaning of the Income Tax Acts.

(5) That the banking account is kept in the name of the county treasurer.

(6) That the interest in question is yearly interest, payable by the bank out of profits and gains chargeable by virtue of 5 & 6 Vict. c. 35, and that the assessment, if any, thereon should be made upon the said bank: *vide* section 40 of 16 & 17 Vict. c. 34, and section 102 of 5 & 6 Vict. c. 35.

(7) That interest within the meaning of section 2 of 16 & 17 Vict. c. 34 means interest receivable by the person to be assessed, and in the nature of a profit or gain to that person. That in interpreting the section the context as a whole must be taken into consideration.

(8) That the subject-matter of assessment was not interest, but *K. B. Div.* merely an accretion of rates. 1910.

(9) That the interest if assessable at all should, under section 40 of 5 & 6 Vict. c. 35, be assessed on the county treasurer. MATTHEWS, Appellant; CORK

(10) That the said sum of £1792 was applied to charitable purposes, including poor-law relief, hospitals, and upkeep of highways, &c. Co. COUNCIL, Respondents.

On behalf of the Crown it was contended:—

(1) That all interest of money is taxable under the Income Tax Act of 1853, section 2, and also under the Income Tax Act of 1842, section 100 (Case 3), and section 102: *vide Clerical, Medical, and General Life Assurance Society v. Carter* (1), and *Leeds Permanent Benefit Building Society v. Mallandaine* (2).

(2) That whether interest is annual or not does not affect liability. If it is annual, it is assessable under section 102 of the Act of 1842, seeing that it has not suffered tax by deduction. If not annual, it is chargeable under section 100 (Case 3) of that Act: *vide Leeds Permanent Benefit Building Society v. Mallandaine* (2).

(3) That the said sum of £1792 was interest and not accretion of rates, or alternatively, it was "profit or gain" within the meaning of the Income Tax Acts, and assessable thereunder.

(4) That interest is assessable, notwithstanding the fact that the application of the moneys is governed by Act of Parliament: *vide Mersey Docks and Harbour v. Lucas* (3); also *Paddington Burial Board v. Commissioners of Inland Revenue* (4), and *Dublin Corporation v. M'Adam* (5).

(5) That the management of the funds of the county of Cork is entirely in the hands of the respondents, and that the respondents are consequently the body legally in receipt of the interest.

(6) That the respondents appoint, and may, without assigning any reasons, revoke the appointment of their treasurer, who can only distribute moneys at the order of the respondents. Consequently, that the treasurer is merely an officer of the respondents, liable to

(1) 22 Q. B. D. 444.

(2) [1897] 2 Q. B. 402.

(3) 8 A. C. 891.

(4) 13 Q. B. D. 9.

(5) 20 L. R. Ir. 497.

K. B. Div. the Crown under section 54 of the Income Tax Act, 1842, for doing
 1910. all things necessary to the assessment of the respondents: *vide*
MATTHEWS, section 47 of the Local Government (Ireland) Act, 1898, where
Appellant; the treasurer is referred to as the "treasurer of such council."
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Co. COUNCIL, (7) That the respondents are assessable, and it is immaterial
Respondents. whether the name of their treasurer be added or not: *vide* section 40
 of the Income Tax Act, 1842, and *Curtis v. Old Monkland*
Conservative Association (1).

(8) A county council, although not a trading body, is liable to income tax: *Attorney-General v. London County Council* (2).

The Commissioners stated that in their opinion the contentions of the Crown were correct in law, but that as the circumstances for 1908-9 were similar to those of 1903-4, for which year the late Recorder of Cork overruled a decision of the Commissioners for Special Purposes in favour of the Crown, they discharged the assessment. On the requisition of the appellant they stated the present case.

The Attorney-General (The Right Hon. Redmond Barry, K.C.) with him *The Solicitor-General (Charles A. O'Connor, K.C.),* and *Coll,* for the appellant:—

The interest in question is payable to the defendants under section 2 of the County Treasurers (Ireland) Act, 1867 (30 & 31 Vict. c. 46), which provides that the Grand Jury (now represented by the County Council) shall appoint a banking company to act as treasurer, and shall fix with such banking company the amount of interest to be allowed for money from time to time lying to the credit of the county. Thus these sums are expressly allowed as interest, and are therefore liable to income tax as being "interest of money" within Schedule D. of the Income Tax Act, 1853. These words "interest of money" are perfectly general, and are not to be restricted to interest arising from profit or gains, or to yearly interest: *Clerical, Medical, and General Life Assurance Society v. Carter* (3); *Leeds Benefit Building Society v. Mallandaine* (4). It is contended by the defendants that they are

(1) [1906] A. C. 86.

(2) [1907] A. C. 131.

(3) 22 Q. B. D. 444.

(4) [1897] 2 Q. B. 402.

not in receipt of the funds in hands of the county treasurer, such treasurer being an independent officer. This contention is not sustainable. The treasurer holds the fund merely on account of the County Council. All receipts of a County Council, whether from rates or other sources, are to be paid to the treasurer and carried to the county fund, and payments by the treasurer out of such fund, unless made in pursuance of a statutory provision or order of a competent Court, can only be made in pursuance of an order of the Council: Local Government (Ireland) Act, 1898, section 47; Application of Enactments Order, 1898, Article 18 (1). These sums paid to the treasurer are expressly referred to as receipts of the County Council in section 47 of the Local Government Act. The defendants rely on section 40 of the Income Tax Act, 1853, and section 102 of the Income Tax Act, 1842, as showing that the assessment (if any) should be made on the bank, and not on the County Council. But the provisions of these sections apply only to yearly interest. Even if they were applicable to the present case, they merely show that the bank may be liable, but do not negative the alternative liability of the County Council. It is further contended that this interest is merely an accretion of the rates, and presumably it will be argued that as the rates are not liable to income tax, the accretion is not liable. But this interest is not a natural growth of the rates. It is the fruit of contract. It is a distinct and separate subject-matter of taxation: *Clerical, Medical, and General Life Assurance Society v. Carter* (1), per Lord Esher, M.R. (p. 448). [He also referred to *Corporation of Dublin v. M'Adam* (2); *Attorney-General v. London County Council* (3).]

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Ronan, K.C., and *Conner, K.C.* (with them *Lawrence*), for the Cork County Council:—

Reading the whole of Schedule D. of the Income Tax Act, 1853, together, it evidently intended to deal only with income in the nature of profits and gains; and the "interest of money" there mentioned must mean interest in the nature of profits and

(1) 22 Q. B. D. 444. (2) 20 L. R. Ir. 497. (3) [1907] A. C. 131.

K. B. Div. gains. The cases of *Clerical, Medical, and General Life Assurance* 1910. *Society v. Carter* (1), and *Leeds Benefit Building Society v. Mallandaine* (2), were cases of corporations trading for profit. It was never intended by the Local Government (Ireland) Act, 1898, which dealt merely with administration, to make a subject-matter taxable which was not taxable before. Prior to that Act income tax was not payable on this interest. The grand jury had no property vested in them. All the county funds were paid to the county treasurer, who was an independent officer, the only power of the grand jury being to make, through their secretary, orders for payment for certain purposes: 4 Geo. 4, c. 33; 30 & 31 Vict. c. 46. The fund itself was not vested in the grand jury. The legal estate was in the treasurer, the beneficial interest was in the public, and the grand jury had merely a limited power of disposal. Under the Local Government Act the relation of the County Council to the county funds is the same as that of the grand jury formerly. Section 4 (1) transfers, subject to the provisions of the Act, the business of the grand jury, and their powers and duties in connexion with it, to the county council. Section 72, which transfers to the County Council the powers and duties of officers, expressly excepts the office of treasurer. By section 47 all receipts from rates or other sources are to be paid to the treasurer, and all payments to be made by him. Substituting, therefore, the County Council for the grand jury, we have the same relation as before with respect to the county fund, viz., the legal estate is vested in the treasurer, the beneficial interest in the public, and a certain power of directing the disposal for purposes authorized by statute is given to the County Council. The property in the funds is not vested in the County Council. They are not a body "receiving or entitled to" this interest within the meaning of section 100, Schedule D., of the Income Tax Act, 1842. No doubt, Article 15 of the Application of Enactments Order, 1898, purports to vest in the County Council, *inter alia*, all property of the grand jury, but in fact the grand jury never had any property. Even assuming that this interest is liable to income tax, the bank

(1) 22 Q. B. D. 444.

(2) [1897] 2 Q. B. 402.

is assessable, not the County Council: Income Tax Act, 1842, section 102; Income Tax Act, 1853, section 40. [They also referred to *London County Council v. Attorney-General* (1).]

The Solicitor-General in reply:—

Cur. adv. vult.

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PALLES, C.B. :—

May 17.

The question upon this appeal is, whether the County Council of the county of Cork is assessable to income tax upon moneys amounting to £1792 18s. 6d., being *interest* allowed by the Munster and Leinster Bank, the treasurer of the county, for money from time to time lying to the credit of the county in the account of the county with them as its treasurer.

These sums were so allowed in pursuance of section 2 of the County Treasurers (Ireland) Act, 1867 (30 & 31 Vict. c. 46), which enacts by its 2nd section that “The Grand Jury shall appoint a banking company to act as treasurer, and shall fix with such banking company the amount of *interest* to be allowed for money from time to time lying to the credit of the county.”

These moneys were therefore allowed specifically as “*interest*,” and by the Income Tax Act, 1853 (16 & 17 Vict. c. 34), section 1, income tax is charged “for and in respect of,” *inter alia*, “all interest of money, annuities, dividends, and shares of annuities payable to any person or persons, bodies politic or corporate;” and by section 2, the object of which was declared to be “for classifying and distinguishing the several properties, profits, and gains for and in respect of” the duties by that Act granted, property of this nature is brought within Schedule D., and is thereby described as “*all interest of money, annuities, and any other annual profits and gains not charged by virtue of any of the other schedules contained in this Act.*”

The first argument for the respondents was that as the first of the above-mentioned sections was repealed by the Statute Law Revision Act, 1892, the existing taxing enactment is section 2; that having regard to the company in which the words “all interest” are found in that section, they mean “all *annual interest*”

K. B. Div. only; that the money in question, although "interest," is not
 1910. "annual interest," as the amount of the principal moneys upon
MATTHEWS, which it accrued varied from time to time; and consequently
Appellant; is not assessable.
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That point, however, is decisively settled against the contention of the respondents by the decision of the English Court of Appeal in *Leeds Benefit Building Society v. Mallandaine* (1). Rigby, L.J., in giving judgment there, after referring to the repeal of section 1 by the Statute Law Revision Act, says: "But it is not suggested on the part of the appellants, nor do I think it could be reasonably suggested, that that repeal alters the substantial law on the subject. We are not only entitled, but bound, to read section 1 as if, except for the purpose of the Statute Law Revision Act, it had not been repealed. There I find, as a separate taxable subject, in words which are perfectly unambiguous, 'all interest of money.' That, which is the charging section, affords a key, if any key were wanted, to the meaning of the same words when we get them in the Schedules of Charge, Schedule D., s. 2, 'for and in respect of all interest of money'—the very words in the charging section. That being so, I do not think we are at liberty to go further and to see whether those words, following exactly the charging section, might, if they were found only in the Schedule, by some possibility be cut down by some words there to be found." Having regard to this case, and to a prior case of *Clerical, Medical, and General Life Assurance Society v. Carter* (2) (in which the same construction of these sections was indicated, although not made the subject of express decision), the suggested limitation of the existing material section (section 2) is in my opinion quite unsustainable.

The next objection is that this "interest" is an accretion to the rates leviable by the County Council; and that as those rates are not assessable to income tax, neither is the interest thereon.

It may be admitted that (subject to the exception of rates which assume the character of "profits or gains arising or accruing from any trade," as, for instance, those imposed by a Corporation by reason of a supply of water beyond its municipal limits:

(1) [1897] 2 Q. B. 402.

(2) 22 Q. B. D. 444.

Corporation of Dublin v. M'Adam (1)), rates raised by a county council are not assessable to income tax. But this is so, because the surplus of the rates raised for the county purposes over the expenditure for those purposes is undoubtedly not profit or gain arising or accruing from a trade within the meaning of sections 1 and 2 of the Act of 1853, and therefore there is no subject rendered liable to taxation by the Income Tax Acts within the words of which such rates are comprised. But the moment the County Council lends out these moneys at interest, the result thereof is to produce a new "subject of taxation"—a product which is so far dissimilar to the principal from which it springs that it does answer a description in the Act of taxable "subjects," viz. "all interest," and by reason thereof it is taxable. The reasoning addressed to us on this point by Mr. Conner is hardly logical.

Next it is said that, prior to the coming into operation of the Local Government Act of 1898, until which time county rates were levied by Grand Juries, income tax was, as a matter of fact, not assessed on interest accruing under this second section of the Act of 1867; that, as matter of law, it was not then assessable; and that the Act of 1898 was not intended to extend the subjects taxable to income tax.

As to the fact, I doubt not that Mr. Ronan was right in saying that, prior to the Act of 1898, income tax was not assessed upon such interest; but I am by no means certain that it was not taxable even then. The words of section 40 of the Act of 1842 are very comprehensive; and I am not clear that, before that Act, the treasurer might not well have been deemed a person "receiving the same," within section 100 of that Act. But, however this may be, I am of opinion that if such interest was not liable to income tax, its escape from liability must have rested solely on the evanescent nature of the Grand Jury. The "subject-matter" was in its nature taxable; and if it were exempt, it must have been so because the procedure provided by Parliament for carrying out its intention to tax was inapplicable to property owned by such a body as a Grand Jury. When the Local Government Act substituted a body with

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(1) 20 L. R. Ir. 497.

K. B. Div. continued corporate existence, in place of that evanescent entity
 1910. whose nature raised the difficulty, the *ratio* upon which its non-
MATTHEWS, liability rested ceased. A similar instance of an enforceable
Appellant ; liability arising from the change in the nature of the body
 CORK
Co. COUNCIL, representing the county, from Grand Jury to County Council,
Respondents. may be found in *Clements v. The Tyrone County Council* (1).
 Palles, C.B.

I now pass from the contention that income tax is not payable in respect of this interest, to the question whether the person liable to pay is the County Council or the treasurer; premising that the amount of the tax was not deducted by the treasurer from interest credited to the county fund, and paid by such treasurer to the collector. This latter circumstance might be material, had I arrived at the conclusion that, but for the omission to deduct, the County Council would not have been the persons liable to pay. Having regard, however, to the opinion at which I have arrived, I need not pursue that subject.

Section 100 of the Income Tax Act, 1842, enacts that the duties "shall be charged annually on, and paid by, the persons, bodies politic or corporate, . . . *receiving or entitled* unto the same," meaning by the words "the same" the description of property or profits mentioned in the earlier part of the section.

The argument for the County Council is, that they neither receive nor are entitled to the moneys in question, within the meaning of this section.

Now, by section 47 of the Local Government Act, 1898, all receipts, whether from rates or from sources other than rates, are to be paid to the treasurer; and in a county like Cork, which is not a county borough, are to be carried to the county fund. Again, by the joint effect of that section and of Article 18 of the Application of Enactments Order of the 22nd December, 1898, all payments out of the county fund are to be made by the treasurer; and (unless made in pursuance of the specific requirements of the Act, or of any other Act of Parliament, or of an order of a competent Court), can be made only in pursuance of an order of the council, pursuant to a resolution of the Council passed on the recommendation of its Finance Committee. Further, the treasurer

(1) [1905] 2 I. R. 413, 542.

is appointed by, and is liable to be dismissed by, the Council. The only sums which the treasurer is, by the Local Government Act, or, so far as I am aware, by any other Act, bound to pay without an order of the Council, are certain of its debts or obligations; and no Court could order payment out of the county fund of any sum which was not such a debt or obligation. As regards this interest, the treasurer is the hand to receive, as well as the hand to pay. It is his duty to pay and to receive. Under these circumstances, I cannot entertain any doubt that he must be deemed to have received these sums as treasurer.

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Further, viewing as a whole, and construing together, the Local Government Act and the various other Acts incorporated with it, I am of opinion that the relation between the County Council and its treasurer is the ordinary relation of customer and banker, with a superadded liability in the banker to a particular class of creditors, of the kind which every day arises in cases of a bank's private customers, when parts of the sums to their credit are garnished by orders of this Court. I hold that, save in relation to the sums necessary to satisfy this particular class of creditors (as to which no question arises here), the relation is that of customer and banker.

It follows that the receipt by the treasurer of these sums for interest must, as between the Crown and county, be deemed to be a receipt by the county; and further, that within the meaning of section 100 of the Act of 1842, the County Council both has received, and was entitled to, the interest in question here.

Neither is the interest within any of the sections of the Income Tax Acts which have been referred to as effecting exceptions out of section 100, by imposing an obligation to pay income tax on these sums on any person other than the council. For instance, although the sums in question are "interest," they are not "annual" interest, the amount of income tax on which should, under section 100 of the Act of 1842, be deducted by the payer.

Mr. Ronan has been good enough to refer us to the report of *The Glamorgan Quarter Sessions v. Wilson* (1), published since the argument, but which my brother Kenny had previously brought to

(1) [1910] 1 K. B. 725.

K. B. Div. my notice. It is an interesting case, in reference to the question
 1910. of the liability to income tax of interest on county funds prior to
MATTHEWS, the Local Government Act; and it bears, too, upon the view I
Appellant; have expressed as to the liability of the County Council here,
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Co. COUNCIL, notwithstanding the treasurer being the custodian of the fund.
Respondents. So far as it bears upon the present case, it confirms the opinion I
 Palles, C.B. have expressed.

In result, then, I arrive at the same conclusion as did the Special Commissioners of Income Tax. They rightly, in my view, deferred to the opinion of the late Recorder of Cork, and decided against their own opinion. Effect must now be given to that opinion; their decision contrary to it must be reversed, and the County Council will pay the costs of the case stated.

KENNY, J. :—

I concur. I entertain no doubt as to what our determination should be in this case which has been submitted by the Income Tax Commissioners. It substantially raised three questions—(1) Whether the County Council was assessable; (2) the construction of the words “interest of money” in the second section of the Income Tax Act of 1853; and (3) whether liability for the tax was cast on the County Treasurer alone, to the exclusion of the County Council.

On the first point I think it is clear that the County Council of a county, who are an elective and permanent corporation, possess all the powers of the old grand jury, which was a transient body. The property of the grand jury, as defined by Article (1) of the Schedule to the Privy Council Order of 22nd December, 1898, is also vested in the County Council by the 15th Article of the same schedule. All the receipts of a County Council have, under the 47th section of the Local Government Act of 1898, to be carried to the credit of the County Fund, and that fund is under the control of the County Council. The treasurer of the council is in most cases a banking company, and the county fund is physically in the hands of such treasurer. The council is the owner of this county fund. It is inconceivable, having regard to the Local Government Act, that any person or body, except the County Council, could be the legal owners of that fund. Section 47

expressly refers to the fund as their fund. It is made up largely of the rates. The latter are not assessable to income tax, and the County Council is not a trading corporation; but I find nothing in the Income Tax Acts to relieve a body in the position of the County Council from liability to assessment in the event of its receiving an income which, in the hands of a private individual, would be liable to assessment.

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On the second point I think it clear that the interest which their treasurer has agreed to pay is liable to income tax. The second section of the Act of 1853, Schedule D, is most wide in its application. It imposes liability on different classes of annual gains and profits from any kind of property, and then goes on to particularize certain classes, winding up in its last paragraph with "interest of money, annuities, and other annual profits and gains." These words are very distinct, and in the *Leeds Society v. Mallandaine* (1), and the *Glamorgan Case* (2), referred to by the Lord Chief Baron, were treated as including interest of every character. I cannot see how any narrower construction could be placed on the section.

I entertain an equally strong opinion that the Crown's contention on the third point is correct. It may be that the county treasurer, as the custodian of the fund, is liable for the tax; but the casting of such liability on the treasurer cannot relieve from assessment the body which receives and benefits by the payment of the interest.

WRIGHT, J., concurred.

Solicitor for the appellant: *The Solicitor of Inland Revenue*.

Solicitors for the respondents: *Thomas Exham & Sons*.

J. G. T.

(1) [1897] 2 Q. B. 402.

(2) [1910] 1 K. B. 725.

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Feb. 5.

BELFAST POOR LAW GUARDIANS *v.* LORD MAYOR,
ALDERMEN, AND BURGESSES OF BELFAST;
COUNTY COUNCILS OF ANTRIM AND DOWN,
APPELLANTS (1).

Rating—Union comprising county borough and portions of counties—Re-valuation of county borough—Apportionment of Union charges—Local Government (Ireland) Act, 1898, sections 43, 65, sub-sect. 2.

In a Union which comprised a county borough and portions of two adjacent counties, the county borough was revalued under section 65, sub-section 1, of the Local Government (Ireland) Act, 1898, showing a substantial increase of valuation.

Held, affirming the judgment of the King's Bench Division, that the apportionment under sub-section 2 of that section was to be made in proportion to the rateable value of each part of the Union on the valuation of the county borough in force immediately before the revaluation, and on the valuation of the respective county portions in force at that date.

APPEAL, by leave of the Court of Appeal, by the defendants, the County Councils of Antrim and Down, from an order of the King's Bench Division made on the 17th June, 1909.

The proceedings in this case were commenced by a writ of summons, at suit of the Guardians of the Poor of the Belfast Union as plaintiffs, against the Lord Mayor, aldermen, and citizens of Belfast as defendants, claiming £25,771 5s. for rates payable by the defendants to the plaintiffs.

A special case was stated by the parties under Order XXXIV for the opinion of the Court. The material parts of the case were as follows :—

On the 15th July, 1899, the defendants applied to the Lord Lieutenant under section 65 of the Local Government (Ireland) Act, 1898, for a revaluation of rateable hereditaments within the city of Belfast. A warrant to the Commissioner of Valuation

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

was issued by His Excellency, and the revaluation was made, but not completed until the 1st June, 1905. In the meantime the former valuation of the city was annually revised, and the rates were struck on the former valuation as so revised up to and including the year 1905.

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Prior to the revaluation coming into effect, the valuation of the city, according to the valuation in force on the 3rd April, 1905, so revised, was £1,271,170 6s. According to the revaluation it was £1,396,027 9s., and as revised up to the 1st March, 1909, it was £1,505,272 18s.

The Belfast Poor Law Union comprises the city of Belfast and portions of the counties of Antrim and Down. Prior to the revaluation coming into force, the union charges were apportioned in proportion to the rateable value of each divided part of the union, under section 43 of the Local Government (Ireland) Act, 1898, according to the valuation in force at the time when the demand of the guardians was made.

By their annual estimate and demand made on the 15th January, 1909, the plaintiffs demanded that the defendants should pay during the financial year ending the 31st March, 1910, £96,090, as their proportion of the total union charges; the apportionment being calculated on the valuations in force at the date of the said demand. The defendants objected that the charges were apportionable under section 65 (2) of the Local Government (Ireland) Act, 1898, in proportion to the respective values of the divided parts of the union according to the valuations existing in 1905, immediately before the revaluation of the city came into force. At meetings on the 27th February and the 1st March, 1909, between the Chairman of the Board of Guardians and the Chairman and Vice-Chairman of the Finance Committee of the Belfast Corporation to discuss the matter, it was stated that the Board of Guardians were advised to adhere to their apportionment, but presented an amended estimate and demand for £95,959.

The sum of £25,771 5s. claimed in the writ was made up as follows:—£22,208 5s., being one quarter of £88,833, in respect of general charges; and £3,563, being one half of £7,126, in respect of repayment of loans.

The question reserved for the opinion of the Court was,

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“Whether, upon the true construction of section 65 (2) of the Local Government Act, 1898, the said union charges for the year ending the 31st March, 1910, are apportionable (as the plaintiffs contend) between each part of the said union in proportion to the rateable value of the said city of Belfast, according to the said revaluation of the 1st June, 1905, and the rateable values of the respective county portions of the said union according to the valuations in force at that date; or whether the said charges are apportionable (as the defendants contend) in proportion to the rateable value of the said city of Belfast according to the valuation in force immediately before the said revaluation came into force, and the rateable values of the respective county portions of the said union according to the valuation in force at that date” (1).

The special case was listed for the 1st June, 1909, when the Court, Palles, C.B., and Johnson, J., without argument, adhered to their decision on the second question in *R. (Belfast Corporation) v. Belfast Poor Law Guardians*, and an order was drawn up of which the curial part was as follows:—

“The Court is of opinion, that upon the true construction of the said section 65 (2) of the Local Government Act, 1898, the said union charges for the year ending 31st March, 1910, are not apportionable between each part of the union in proportion to the rateable value of the city of Belfast, according to the revaluation of the 1st June, 1905, and the rateable values of the respective county portions of the union according to the valuations in force at the said date; and the Court is further of opinion, that said charges are apportionable in proportion to the rateable value of the city of Belfast, according to the valuation

(1) The same question had been previously raised (*R. (Belfast Corporation) v. Belfast Poor Law Guardians*) by *certiorari* upon the argument of motions to make absolute conditional orders which had been obtained by the Corporation of Belfast to quash the apportionment and demand note. Two questions were then argued—(1) whether *certiorari* would lie; (2) whether the Guardians' principle of apportionment was right. The judgment of the Court (an unrevised copy of which was supplied to the Court of Appeal in the present case) was delivered on the 7th May, 1909, by Palles, C.B., deciding against the Corporation on the first point, but in their favour on the second, and discharging the conditional orders. The Court directed the present proceedings to be adopted.

in force immediately before the said revaluation came into force, and the rateable values of the respective county portions of the union, according to the valuations in force at the same date."

On 11th October, 1909, *Hanna*, for the Antrim County Council, and *James Andrews*, for the Down County Council, *Ronan, K.C.*, for the Belfast Corporation consenting, obtained from the Court of Appeal (Palles, C.B., and Holmes, L.J.) leave to appeal from this order; and by order of the King's Bench Division, dated the 26th October, 1909, the writ of summons and the special case were amended by adding the County Councils as co-defendants, and they jointly appealed.

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Herbert Wilson, K.C. (with him *Hanna*) for the Antrim County Council, and *D. M. Wilson, K.C.* (with him *Andrews*), for the Down County Council):—

Section 43 of the Local Government (Ireland) Act, 1898 (Vanston's Local Government Acts, vol. i., p. 46), provides that, notwithstanding anything in any Act, the union charges shall be raised equally over the whole union, and where the union is divided between more than one county the total amount shall be apportioned between each divided part in proportion to rateable value. This means annual rateable value. Section 34 of the Valuation Act, 1852 (15 & 16 Vict. c. 63), provided for revision of valuation every fourteen years on the application of the Grand Jury of the county. These revisions were in effect revaluations, and they are so described in the marginal note to that section, and they are so treated in section 65 (3) of the Local Government Act, 1898 (Vanston, vol. i., p. 71). Under section 11, the valuation of houses and buildings is to be made upon an estimate of their net letting value, while the valuation of land was to be according to the average prices of agricultural produce. Sections 4 and 5 of the Valuation Act, 1854 (17 & 18 Vict. c. 8), provide for annual revision; see Article 37 of Application of Enactments Order, 1898, vol. i., Vanston, pp. 303-306. We contend that the apportionment under section 65 of the Local Government Act should be made on the basis that the rateable value of the city is that ascertained by the revaluation completed in 1905. That would be in accordance with the natural meaning of the words used in section 65. The valuation of the

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city "when the revaluation came into force" must mean the valuation as appearing in the revaluation. If, as directed by sub-section 3, you read "revision" for "revaluation," the effect of sub-section 2 is transparently clear. What object can be attributed to the Legislature in stereotyping for all time the antecedent valuation which the revaluation demonstrated was misleading, and which it was the purpose of the revaluation to remedy? Surely not to work out injustice to the county portions contributing to the rates, whose interests were, as the Chief Baron admits, carefully guarded by the Act of 190 .

Ronan, K.C., and Gordon, K.C. (with them, Harrison, K.C. and Overend), for the Corporation of Belfast:—

The effect of revaluation may either be to raise the existing valuation or to lower it. If the valuation of every contributory area were proportionately raised, no ratepayer would be affected. No public body would proceed to revaluation if the effect must be to raise the value of their district, and relieve neighbouring areas at the expense of their own. The object of section 43 of the Act of 1908 was to establish union rating according to the rateable value. This was substituted for the antecedent divisional rating. Section 65 deals with the rateable value mentioned in section 43. There is no inconsistency between them—one is supplemental to the other. The revaluation depends on the voluntary act of the representatives of one of the three contributory areas. It is irrational to suppose that the Legislature intended to give the representatives of the one area power to increase the burden resting on the others.

If section 65 (2) had been omitted altogether from the Act, what would have been the liability of the three areas? It would have been apportioned according to the basis contended for by the appellants. Section 43 would have sufficed for this purpose. Section 65 (2) was intended to preserve the antecedent proportional liability to rates. Up to that time it was possible to contrast the valuation of the three areas *inter se*. But when revaluation of one area took place, while the valuation of the others remained unchanged, the contrast became impossible; and if proportional rating was to continue on the old principle,

having regard to an equitable and rational basis of contribution, it was essential that the safeguard effected by sub-section 2 of section 65, interpreted as we contend it ought to be, should be provided. Take the case of a house in the city valued before the revaluation at £40, and a house in the county also valued at £40, the Commissioner of Valuation on the revaluation alters the revaluation of the house in the city to £50, or, it may be, £30; the valuation of the house in the county remains unchanged. How is the basis of contribution to continue unaltered, unless sub-section 2 is given the construction we seek to put upon it? "At the date" when the revaluation came into force means "immediately before": *Roe v Cooney* (1). This is plain from the context.

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H. Wilson, in reply :—

In the line of argument adopted by the counsel for the Corporation of Belfast, it is admitted that the only question in dispute is the meaning of sub-section 2 of section 65. We say that it was designed to substitute the revaluation for the old valuation. The corporation say it was to stereotype the old. Would that have been their contention if the revaluation had shown a decrease in the value of the city area? Section 43 shows that it was anticipated that this difficulty might arise on the adoption of union rating. Sub-section 2 of section 65 was aimed at providing the solution. What object could there have been in stereotyping for an unknown time the old valuation, which was shown by the revaluation to be unreliable and misleading. The annual revision of the old valuation was on a basis which the revaluation was designed to correct. Section 65 (2) was introduced to exclude annual revisions from forming the basis of the proportion for five years. The expression "rateable value" in the Local Government Act, when used in relation to areas, means the annual rateable value under the Valuation Acts of all the hereditaments comprised in the area: section 109, Vanston, vol. i., p. 112. The word "subsequent" in the proviso in section 65, sub-section 2, must mean subsequent to the revaluation.

(1) 14 L. R. I. 243.

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The judgment of the Court was delivered by

CHERRY, L.J. :—

The question raised by this appeal relates to the basis of apportionment of union charges under the Local Government Act, 1898, where part of a union consists of a county borough, and the remainder of portions of adjoining counties.

The Belfast Poor Law Union comprises the city of Belfast and also portions of the counties of Antrim and Down. A general revaluation has been made under section 65 of the Local Government Act, 1898, of the rateable hereditaments within the city. The new valuation was completed on the 1st June, 1905, and resulted in an increase of the total valuation of the city from £1,271,170 to £1,396,027; the valuation of the county portions of the union remaining unaltered.

The 43rd section of the Local Government Act, 1898, provides that all expenses of the guardians of a union shall be raised equally over the whole union, and that where a union is divided between more than one county the total amount is to be apportioned between each divided part in proportion to rateable value, the amount so apportioned to a divided part to be raised equally over that part as if it were a separate union.

Section 65 of the same Act, by its first sub-section, provides for a revaluation being made, as has been done in Belfast, on the application of the council of a county borough. The second sub-section, which is the one we have to interpret, is in the following terms (61 & 62 Vict. c. 37, section 65 (2)) :—“Where part of a union is within and part without any county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union in proportion to the rateable value of each part at the date when the revaluation under this section came into force: Provided that after the expiration of five years from that date, if no general revision has meantime been made, the Commissioner of Valuation, if satisfied by the council of the borough, or the guardians representing the electoral divisions of the union situated outside the borough, or a majority of them,

that the apportionment has become inequitable by reason of subsequent changes in the value of any hereditaments in the union, may revise the proportion in which the union charges are to be apportioned."

The county portions of the union contend that the calculation for the purposes of apportionment under this section for the year ending 31st March, 1910, should be made according to the new and revised valuation; the respondents, who represent the Corporation of Belfast, contend that it should be made according to the valuation previously in force in the city.

I agree with the view of Palles, C.B., in his judgment in the Court below, that the words of the section, "in proportion to the rateable value of each part *at the date* when the revaluation under this section came into force," must be construed as referring to the period of time immediately before, not immediately after, the change. Read by themselves, without reference to the context or to other sections of the Act, the words are certainly ambiguous, and might be interpreted as referring to the new or the old valuation; but still I think that, according to the ordinary use of language, they would be understood as meaning the previous state of affairs. A man is often said to be filling a certain position "at his death"; and in the only case which was referred to in the course of the arguments, *Roe v. Cooney* (1), the words "at the expiration" of a lease, were held by this Court to mean "up to and at," not "after" the lease had expired.

I do not, however, attach very much importance to any considerations based upon the true grammatical meaning of the word "at," which, according to the context, may refer either to the period immediately before or the period immediately after a particular change. The case was not argued before us by either party upon such lines. I think we must arrive at the meaning of the sub-section by reading it as a whole, and considering it in connexion with the other sections of the same Act, and the various statutes dealing with valuation.

Viewing it in this light, the argument which most impressed me, and to which I can see no answer, was that put forward by

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Mr. Ronan, that if the construction sought to be put on the words by the appellants, namely, that they referred to the new and revised valuation, was correct, the sub-section itself would be entirely unnecessary, as the same result would be arrived at by applying the provisions of section 43 alone, "rateable value" in that section meaning, according to the interpretation clause (section 109), "annual rateable value." The answer attempted to be made by the counsel for the contributing counties to this argument was that the sub-section was required in order to stereotype the revised valuation for a period of five years, and exclude the annual revisions of it from the calculation. But why should this be done, on the assumption that the revised valuation was to be taken as the basis of apportionment? I can understand the exclusion of the annual revisions from the calculation, on the assumption that the old valuation is preserved; for it would be difficult to adjust the revisions of the new valuation to the old one. The units of valuation might not even be the same, and many other difficulties might occur; but no difficulty would be experienced in accurately ascertaining the effect of the annual revision upon the new valuation. This is only a question of arithmetic. The attempted reply, therefore, appears to me to be an additional argument in favour of the respondents. Again, immediately following the words we have to construe, comes the proviso enabling the Commissioner of Valuation, after the expiration of five years, to revise the proportion in which the union charges are to be apportioned "if no general revision has meantime been made." What is the meaning of these last words, on the appellants' construction of the sub-section? Mr. Wilson says that they refer to a revaluation of the contributing counties. If this be so, would not the fact that a revaluation had been made of the county portions of the union, subsequently to that of the borough, be all the more reason for taking into account subsequent changes in the value of hereditaments in the borough since the date of its revision, rather than for omitting to do so? If, on the other hand, they mean, as Mr. Gordon contends that they mean, a revision of the valuation of the whole union, as distinct from either the borough or the portions of the counties included in the union, then the construction of the proviso becomes simple and reason-

able, for in that event there is no necessity for the Commissioner of Valuation to intervene at all.

As to the argument that it would be absurd to suppose that the Legislature intended an old valuation to be applied, after a new and revised one had been made, I think the answer is, that the old valuation is preserved only for the purpose of a general apportionment as between different parts of the union. Revised up to date by the annual revisions, the old valuation of the borough, made upon the same principle as that of the counties, is a much more accurate indication of relative ability to bear taxation than a new one would be, based, perhaps, upon an entirely different principle. It is true that the valuation of the counties may be revised also, but this has never been done, and it might reasonably be assumed that it is not likely to be done. I can, therefore, see nothing unreasonable or unjust in supposing that the Legislature intended to preserve, for purposes of apportionment only, the old unrevised valuation of a borough, notwithstanding that a revaluation for all other purposes had been made under the earlier part of section 65.

In my opinion, therefore, the answer to the question in the case stated should be, that the charges are apportionable according to the valuation in force in the City of Belfast immediately before the revaluation came into force, and the valuation in force in the respective county portions of the union at the same date.

The order of the Court below should therefore be affirmed, and the appeal dismissed with costs.

Solicitors for the appellants : *B. M. Johnson and T. M. Greer.*

Solicitor for the respondents : *John M'Cormick.*

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Highway—Drain—Duty of adjoining occupier to scour—Water flowing from highway—Discharge on adjoining lands—Absence of a channel at outlet of drain—Prolonged user—Presumption of legal origin—6 & 7 Wm. 4, c. 116, s. 162; 14 & 15 Vict. c. 92, s. 9.

The defendant was the occupier of lands adjoining a highway, and separated therefrom by a bank 3 feet in width. A drain, or eye, which had been in existence for twenty-nine years, and by means of which surface-water from the highway was discharged on to the defendant's lands, passed through the bank. There was no evidence as to the origin of the drain, nor was there any defined channel on the defendant's lands into which the water so discharged could flow, nor any evidence that there had ever been such a channel. The defendant was prosecuted under 14 & 15 Vict. c. 92, s. 9, for neglecting to scour the drain in question when required to do so by the road authority.

Held, that the Court ought to presume a legal origin for the drain, and that the defendant was therefore bound to scour it.

Attorney-General v. Copeland ([1902] 1 K. B. 690) applied.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held in the Petty Sessions district of Moneygall, King's County, the respondent, Timothy Kennedy, was charged as defendant in a summons on the complaint of the appellants, the County Council of King's County and J. J. O'Sullivan, County Surveyor, as follows:—

"That you, the said defendant, as occupier of the lands known as Moneygall, in the townland of Moneygall, barony of Clonlish, King's County (said lands being contiguous to the public road leading from Moneygall to Borrisoleigh in said county), omitted, and still omit, to scour the drain leading from the said public road to said lands, so as to allow water to pass away, within ten days after notice being served on you, contrary to the statute 14 & 15 Vict. c. 92, section 9."

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, J.

At the hearing of the complaint the following evidence was given :—

Service of the ten days' notice required by the said statute was admitted.

Authority to the County Surveyor to prosecute was proved.

The County Surveyor proved that damage was done to the road by water remaining thereon, and that the road was impassable at times.

Henry Browne, Assistant Surveyor, proved that there was an eye or hole through a bank about 3 feet thick, which was the road fence; that the eye or hole led into the defendant's field, and that water passed through it from the road; that the eye or hole had been in existence for about twenty-nine years; that in recent times there was much more water on the road than formerly; that a scheme for draining the road had been prepared by the late County Surveyor and rejected by the District Council on the ground of expense.

W. Meara, road contractor, gave similar evidence as to the character, situation, and functions of the hole in question, and proved that he had found it stopped up, and had re-opened it.

The defendant gave the following evidence:—That he had owned the field in question for about twenty-nine years; that for the last eighteen months a far greater amount of water came down the road than had formerly been the case, and that his field was flooded and damaged to the extent of half an acre; that, previously, there had been only surface-water, which did no damage, and that no complaints had been made; that he stopped up the hole from time to time; that the hole formerly took off the surface-water; that there was no drain of any kind in his field to carry off the water; that there never had been an opening from his land to the adjoining lands; that about sixteen or seventeen years ago the then road contractor cut a hole from the road into another person's field adjoining his.

G. Friend gave evidence that he had known the road for forty years; that the eye or hole from the road into the defendant's field had been enlarged; that till about eighteen months ago the water did no harm to the road; that, on a change of occupiers of some lands higher up the road, an old water-course

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was scoured, which caused an increased amount of water to come down the road; that for many years prior to the said change of ownership the water-course, which came from adjoining mountain lands, was never scoured; and that the water had flowed over adjoining lands and been absorbed.

The Justice dismissed the case without prejudice, "being of opinion that the eye or hole was not a drain within the meaning of the Act, inasmuch as it was the duty of the contractor of the road to keep it clear, and not the duty of the defendant; that the summons was not for obstructing the passage of water from the road into his land, but was for omitting to scour a drain from the public road to said lands; . . . and that there was no evidence of any drain existing on the defendant's lands; and that the summons did not cover the act it was intended to meet, viz., obstructing the eye or hole in the road fence."

No application was made to the Justice to amend the summons at the hearing of the case.

On the application of the complainants, the Justice stated the foregoing case for the judgment of the Court upon the question whether he was "correct in point of law" in his determination.

W. J. Johnston (with him *Serjeant O'Brien, K.C.*), for the appellants:—

The only question in the case is, whether the eye or opening leading from the road on to the defendant's lands is a "drain" within the meaning of section 9, sub-section 1, of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92). If it is, the defendant is clearly bound to scour it when required to do so by the road authority: see section 9, sub-section 1, of the Statute, and also the judgment of O'Brien, J., in *Scannell v. French* (1). At common law the owners of adjoining lands are bound to keep a highway in order: 1 Hawkins P. C. 698; Pratt on Highways, p. 256.

The word "drain," as used in the Summary Jurisdiction

(Ireland) Act, 1851 (14 & 15 Vict. c. 92), is of very wide import. *K. B. Div.*
 The object of section 9, sub-section 1, is to have drains kept ^{1910.}
 open "so as to allow the water to pass away." As to the ^{KING'S}
 meaning of the word "drain," see *Croft v. Rickmansworth Highway Co. COUNCIL*
Board (1); in that case Lopes, J., defined a drain as "something ^{v.}
 conducting liquid away, and into which liquid may continuously ^{KENNEDY.}
 pass." The existence or non-existence of a channel on the
 defendant's lands is immaterial: *Attorney-General v. Copeland* (2).

Denning, for the respondent:—

The complainants are not entitled to succeed in this case, unless they can establish a lawful origin for the eye or opening; and, for that purpose, produce evidence that there was at some time a drain on the defendant's lands which could receive and carry away the water as it came through the opening: see the definition of a drain given by Lord Alverstone, C.J., in *Attorney-General v. Copeland* (3), and the judgment of Collins, M.R., in the same case (2). It is clear that there never was such a drain in the present case. If this opening had been made in exercise of the powers conferred by the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), the grand jury would have been bound to make a drain on the defendant's lands, and to compensate him: see section 162. The complainants have no right to swamp the defendant's lands.

Serjeant O'Brien, K.C., in reply:—

In order to ascertain the meaning of the word "drain" in the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92), the Court must have regard to the function which it is to fulfil, viz., allowing water to pass away from the highway. The object of the Act is to get water off the roads; its ultimate disposal is immaterial. This drain has been in existence for twenty-nine years, and has fulfilled this function: the Court ought therefore to presume that it had a legal origin: *Attorney-General v. Copeland* (2); see especially the judgment of Romer, L.J., at p. 694 of the report.

(1) 39 Ch. D. 272.

(2) [1902] 1 K. B. 690, at pp 693, 694.

(3) [1901] 2 K. B., at p. 106.

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1910.
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v.
KENNEDY.

LORD O'BRIEN, L.C.J. :—

The question in this case is, whether the defendant has committed an offence under section 9, sub-section 1, of 14 & 15 Vict. c. 92, in omitting to scour a drain or channel after he had been served with the prescribed notice requiring him to do so.

The drain in question is an eye or opening leading from a public road to the defendant's lands, through a bank 3 feet thick ; and the evidence shows that for twenty-nine years it has served to drain off water from the road in question.

The case has been very ably argued on behalf of the defendant by Mr. Denning, who contended that, unless the complainants can establish a lawful origin for the drain, and for that purpose produce evidence that there was, at some time, a drain on the defendant's lands into which the water coming through the opening could escape, the defendant cannot be made responsible for refusing to scour it.

If we were to give effect to that contention, we should be imposing upon a public body the *onus* of proving the origin of a state of facts at a time when evidence upon the point would be difficult, perhaps impossible, to procure, and grave inconvenience would follow. In the present case, the drain has, as I have said, been used for twenty-nine years to carry off water from the road, and I think that in such a case we ought, in the absence of evidence to the contrary, to presume that it had a legal origin. With regard to this point I adopt the reasoning of Romer, L.J., in *Attorney-General v. Copeland* (1). The question in that case related to a pipe which ran through a bank dividing a highway from the defendant's lands, and drained off water from the highway. In dealing with the question of the origin of the pipe, which had been relaid by the surveyor of the highways in 1868, Romer, L.J., is reported to have said at p. 694 :—

“To my mind, the authority for the time being could have executed this work, short as the distance may be, under the powers conferred by the Highway Act, 1835 ; and, after the

(1) [1902] 1 K. B. 690.

lapse of so long a time as has elapsed since the work was done, *K. B. Div.* it ought to be assumed that it was done under the authority of 1910. the Act, either with the consent of the owner of the land or upon *KING'S* payment of compensation to him. It is said that this should not *COUNTY* be done because this pipe or drain has no proper outlet. I am *Co. COUNCIL* not sure that I understand what is meant by a proper outlet; *v.* but there is the fact of this lapse of time, and that, at all events *KENNEDY.* since 1868, the water has been discharged without challenge by *Lord O'Brien,* means of this pipe at this spot. Who is to judge whether, when *L.C.J.* the work was first done, there was not a proper outlet? In my opinion, the defendant, after this lapse of time, cannot be heard to say that there was no proper outlet when the drain was made."

Similarly, in the present case, there may have been a drain on the defendant's lands at the time when this opening through the bank was made, and the work may have been done under the powers contained in section 162 of the Grand Jury Act, 1836. Having regard to the long-continued user of this drain through the bank, and to the confusion which would result if we were to yield to the defendant's contention, I think that, in the absence of any evidence as to the history of the drain, we ought to presume a legal origin for its existence.

MADDEN, J.:—

I agree. Lord Alverstone's definition of a drain in *Attorney-General v. Copeland* (1) is a very clear one:—"A drain or water-course for the conveyance of water to some proper outlet." The enactment under consideration in that case was section 67 of the Highways Act, 1835, and, on comparing it with section 162 of the Grand Jury Act, 1836, I can find no substantial difference between them. The context is of the same character, and I therefore adopt the definition which I have quoted, which appears to have been approved of by the Court of Appeal.

My judgment rests upon the presumption that the opening, or out, with which we are now dealing, had a legal origin; and that, when made, it led to some proper outlet; that is to say, that it

(1) [1901] 2 K. B., at p. 106.

K. B. Div. was a "drain" as defined by Lord Alverstone, C.J., in the case
 1910. to which I have referred. This assumption involves payment of
 KING'S compensation to the owner of the adjoining lands when the drain
 COUNTY was made, or his assent to the execution of the work, and also a
 Co. COUNCIL v. general compliance with the provisions of the Grand Jury Act.
 KENNEDY.

Madden, J.

Solicitor for the appellants: *Thomas Conway.*

Solicitor for the respondent: *Adam Mitchell.*

J. C. W.

K. B. Div.
 1909.

KELLY v. LARKIN AND CARTER (1).

Nov. 3, 4, 16.

(1907. No. 9618.)

*Contract—Right to sue on—Action by person not named as party to—
 Beneficial interest—Cestui que trust—No refusal by covenantee to sue.*

A person not named as a party to a covenant is nevertheless entitled to maintain an action upon it if he takes a beneficial right under it in the character of *cestui que trust*, the covenantee standing to him in the relation of trustee. In such a case the plaintiff is not bound, as a condition precedent to his right of action, to show that the covenantee has been asked, and has refused, to sue.

Leasehold lands were conveyed by A to B for valuable consideration. By the deed of conveyance, to which A and B alone were parties, B covenanted with A, and admitted that the conveyance was made on the express condition, that B would pay to C, during the life of the latter, one-half of the annual net profit rent of the lands. An action on this covenant brought by C alone was dismissed on the ground that the plaintiff was not entitled to sue.

On a new trial motion,

Held, (1) that the plaintiff was in the position of a *cestui que trust* under the covenant, entitled to claim payment out of a definitely ascertained fund, and was therefore entitled to maintain the action: and (2) that the plaintiff was not bound, as a condition precedent to his right of action, to prove that A had been requested, and had refused, to bring an action on his behalf.

Gandy v. Gandy (30 Ch. D. 57) followed.

(1) Before ANDREWS, BOYD, and WRIGHT, JJ.

MOTION to have the judgment entered for the defendants in the action set aside; and, in lieu thereof, to have the judgment entered for the plaintiffs; or, in the alternative, for a new trial.

The action, which was tried before Kenny, J., without a jury on the 16th June, 1909, was brought by Robert Kelly against Mary Larkin and Margaret Carter to recover "money payable by the defendants to the plaintiff for money received by the defendants for the use of the plaintiff; viz., £27," being one-half of the profit rent for the years ending the 30th April, 1906, and the 30th April, 1907, received by the defendants out of the lands of Stoneview, Dunmore, and certain adjoining townparks.

The said lands were held under a lease, dated the 28th January, 1843, for three lives and a concurrent term of thirty-one years, at a yearly rent of £12. The said lease was made subject to certain sub-tenancies in the said lands.

It was admitted that the lease was subsisting at the date when the action was brought.

Prior to the year 1887, the lessee's interest in the said lease became vested in one Richard Kelly, brother of the plaintiff.

By indenture, dated the 26th September, 1887, the said Richard Kelly, in consideration of £30, conveyed all his estate in the said lands under the said lease of the 28th January, 1843, to his sister, Susan Carter, her heirs, executors, administrators, and assigns, subject to the rent reserved by the said lease, and to the covenants and conditions therein contained.

The said indenture of the 26th September, 1887, contained a covenant in the usual form by the said Susan Carter, to pay the rent reserved by the said lease of the 28th January, 1843, and to observe the covenants therein contained, and to keep the said Richard Kelly, his executors, and administrators, indemnified therefrom. The said indenture also contained the special covenant and proviso set out in the judgment of Andrews, J.

The said Susan Carter died on the 7th April, 1892, having by her will devised the said lands to the defendants as joint tenants. The plaintiff was paid one moiety of the annual rents and profits of the said lands, from the 7th April, 1892, up to the 30th April, 1905.

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At the trial the Judge gave judgment for the defendants on the ground that the plaintiff, being a stranger to the indenture of the 26th September, 1887, and to the consideration, was not entitled to sue on the covenant.

The Judge's report stated that no evidence was offered to show whether Richard Kelly was alive or not; or to show that he, or, if he were dead, his personal representatives, had been asked and had refused to bring an action on the covenant.

There was a complicated set of accounts, upon foot of which the defendants claimed to be entitled to certain deductions and allowances in estimating the annual net profit rent of the said lands; but there was no finding by the Judge as to the state of the account.

Pim, for the plaintiff:—

I do not question the common law rule laid down in *Tweddle v. Atkinson* (1), that a person who is not a party to a contract cannot sue upon it. The rule, however, is subject to this equitable exception, that, if a person who is not a party to a contract is entitled to claim a beneficial right as *cestui que trust* under the contract, he can maintain an action to enforce it: see *Gandy v. Gandy* (2); *Touche v. Metropolitan Railway Warehousing Co.* (3); *In re Empress Engineering Co.* (4); *Drimmie v. Davies* (5); *Gregory v. Williams* (6); *Davenport v. Bishopp* (7). The plaintiff is entitled to claim the benefit of the covenant as *cestui que trust*: *Gregory v. Williams* (6); *In re Flavell*; *Murray v. Flavell* (8).

Jefferson, K.C., and *R. R. Smylie*, for the defendants:—

"It is settled at common law, that a mere stranger to the consideration cannot enforce performance of a contract, by an action thereon in his own name, although he be the party avowedly

(1) 1 B. & S. 393.

(2) 30 Ch. D. 57, at pp. 66, 67,

69.

(3) L. R. 6 Ch. App. 671.

(4) 16 Ch. D. 125, at p. 129.

(5) [1899] 1 Ir. R. 176, at pp. 189, 190.

(6) 3 Merivale, 582.

(7) 1 Phillips, Ch. R. 698.

(8) 25 Ch. D. 89.

intended to be benefited thereby": Chitty (ed. 1909) at p. 37; *K. B. Div. 1909.*

Tweddle v. Atkinson (1).

[Wright, J., referred to Roscoe, N.P. (ed. 1907), p. 719.]

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Both in *Drimmie v. Davies* (2) and *Gregory v. Williams* (3), the covenantee was a party to the suit: *Gregory v. Williams* (3) is explained by James, L.J., in *In re Empress Engineering Co.* (4). In *Gandy v. Gandy* (5), in which a wife was allowed to maintain an action against her husband on a separation deed, the covenant on which the action was brought was in reality made with the wife; the trustees were merely introduced to get over the difficulty that the wife could not enter into a covenant with her husband on which an action could be brought: see the judgments of Cotton, L.J., at p. 73, and Bowen, L.J., at p. 74.

The facts of the present case are indistinguishable from those in *M'Coubrey v. Thomson* (6) and *Clitheroe v. Simpson* (7), in which it was held that the plaintiff was not entitled to sue. The latter case was decided after the fusion of law and equity effected by the Judicature (Ireland) Act. *In re Empress Engineering Co.* (4) is also an authority in the defendants' favour.

In any event, the plaintiff must, before he can maintain his action, show that Richard Kelly, the covenantee, has refused to bring an action to enforce the contract: see the judgments in *Gandy v. Gandy* (5), at pp. 74, 75 of the report.

Pim, in reply:—

The ground of the decisions in *M'Coubrey v. Thomson* (6) and *Clitheroe v. Simpson* (7) was that the plaintiff was not in the position of a *cestui que trust* under the contract sued on.

[He also cited 8 & 9 Vict. c. 106, section 5.]

ANDREWS, J.:—

Nov. 16.

This action has been brought by Robert Kelly to recover £27 as money received by the defendants for his use, the sum in question

(1) 1 B. & S. 393.

(2) [1899] 1 I. R. 176.

(3) 3 Merivale, 582.

(4) 16 Ch. D. 125.

(5) 30 Ch. D. 57.

(6) 1 I. R. 2 C. L. 226.

(7) 4 L. R. Ir. 59.

K. B. Div. being claimed as one-half of the net profit rents for two years
 1909. ending 30th April, 1907, of certain lands held under a lease dated
 KELLY 28th January, 1843.

v.
 LARKIN. It is admitted that the term created by the lease of 1843 was
 Andrews, J. in existence when the action was brought; and that during the
 years 1906 and 1907 the defendants were in possession of the
 lands demised thereby. The only question in the case turns upon
 the effect of a covenant in a deed of 26th September, 1887, by
 which Richard Kelly, in whom the lessee's interest in the lease of
 1843 was then vested, transferred that interest to Susan M. Carter,
 the predecessor in title of the defendants. This deed of 26th
 September, 1887, is not only under seal, but was made for valuable
 consideration. It is in the ordinary form, and the only portion
 of it which is material to the question now before us is the following
 special covenant:—

“And the said Susan Carter doth hereby for herself, her heirs,
 executors, administrators, and assigns, covenant, promise, and
 agree to and with the said Richard Kelly, his executors, and
 administrators, and this assignment is made on the express con-
 dition, that she, the said Susan Carter, her heirs, executors,
 administrators, or assigns, shall, out of the rents and profits to
 be received by her or them out of the said premises, well and
 truly pay or apply towards the maintenance of Robert Kelly”
 (the plaintiff), “the brother of the said Richard Kelly, during his,
 the said Robert Kelly's, life one half of the said annual profit rent
 so received by the said Susan Carter as aforesaid: Provided always,
 and it is hereby agreed, that she, the said Susan Carter, her heirs,
 executors, administrators, or assigns, shall only be liable to this
 covenant to the extent of the term hereby demised, and not further
 or otherwise.”

Now, there can be no doubt that Richard Kelly could have
 brought an action upon that covenant; but Robert Kelly, the
 plaintiff, was not a party to the deed; and the only question tried
 by Kenny, J., was whether the latter could maintain an action on
 the covenant. There is no finding that Richard Kelly had been
 asked to sue, and had refused to do so. On behalf of the defen-
 dants it has been contended that, as the plaintiff was not a party

to the contract contained in the covenant, he is not entitled to sue at common law upon it, especially as he has not first requested Richard Kelly to sue; and we were referred to the well-recognized common law rule on the point as laid down in *Tweddle v. Atkinson* (1). To this the plaintiff's counsel replied that the common law rule is subject to this exception, that, if the person for whose benefit the contract is made is in such a position as to be entitled to claim the benefit of it in the character of *cestui que trust*, he can himself bring an action upon it, if the covenantee neglects to do so; and that he is not bound, as a condition precedent to his right to sue, to prove that the covenantee has been requested, and has refused, to bring an action on the covenant. I may point out, in passing, that up to 1905 payments were made to the plaintiff without reference to Richard Kelly; but there is a complicated set of accounts in respect of which the defendants claim to be entitled to certain allowances, and, as the matter now stands, we are not in a position to ascertain the amount which the plaintiff, if entitled to sue, can recover in this action.

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I now turn to the decision in *Gandy v. Gandy* (2), which in our opinion governs the present case. In *Gandy v. Gandy* (2), by a deed of separation made between husband and wife and certain trustees, the husband covenanted with the trustees to pay them an annuity for the use of the wife and two elder daughters of the marriage, and also covenanted, subject to certain provisos, to pay to the trustees all the expenses of the maintenance and education of two younger daughters. On the husband refusing to maintain one of these younger daughters, she, being a minor, brought an action by her next friend against the husband and the trustees to enforce the husband's covenant. The Court of Appeal held that, upon the form of the deed, and having regard to its provisions, the plaintiff did not take any benefit by way of right—any beneficial right—under it, and therefore was not entitled to maintain her action; but they gave her leave to amend the writ by adding the trustees, the wife and the elder daughters, or any

(1) 1 B. & S. 393.

(2) 30 Ch. D. 57.

K. B. Div. of them, as co-plaintiffs. The trustees refused to allow themselves
 1909. to be joined as co-plaintiffs, which the Court of Appeal appears
 KELLY to have thought they had a right to do, and the wife was then
 v. joined as co-plaintiff. In that state of the action, the Court of
 LARKIN. Appeal held that the covenant to maintain the younger children
 Andrews, J. was a covenant in which the wife had an interest; that the trustees
 were trustees for the wife; and that she could maintain the action.
 The principle involved in the case is correctly stated in the head-
 note, which is as follows:—

“To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract.”

Now, the case before us is quite distinguishable from the class of cases in which it has been held that no relation of trustee and *cestui que trust* existed. The liability of one person upon a covenant to pay the debt of another to a third party will not create a trusteeship where the debtor is a stranger to the covenant. In the present case it cannot be left out of consideration that the payment was to be made out of an ascertained fund. The covenant is to pay half the net profit rent. That is a covenant relating to the subject-matter of the demise: there is a specific source from which the payment is to be made: and unquestionably the plaintiff is the only person beneficially entitled under the covenant. There can be no doubt that, if Richard Kelly, the covenantee, sued for and recovered half the net profit rent of the land, the moment the money reached his hands he could only hold or apply it for the benefit of the plaintiff, standing to him in the relation of trustee. We are therefore of opinion that the plaintiff comes within the purview of the equitable exception to which I have referred.

I shall now refer to two passages in the judgment in *Gandy v. Gandy* (1), in order to make the ground of our decision clear. Cotton, L.J., said at pp. 66, 67 of the report:—

“Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated.”

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It is worthy of observation that Cotton, L.J., does not suggest that the beneficiary is bound, as a condition precedent to his right to sue, to show that his trustee has been requested and has refused to do so.

At p. 69 of the same case, Bowen, L.J., after pointing out that the “true common law doctrine” has been laid down in *Tweddle v. Atkinson* (1), says:—

“Whatever may have been the common law doctrine, if the true intent and the true effect of this deed,” *i.e.* the separation deed, “was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right.”

The objection that the younger daughter—the original plaintiff—had no beneficial interest under the deed having been upheld, the wife was allowed to sue, and it was then contended that she was not entitled to do so; but the same Court held that she was

(1) 1 B. & S. 393.

K. B. Div. in the position of a *cestui que trust*, and could maintain the action.
 1909. There are, no doubt, some observations to the effect that, "as the
 KELLY trustees had refused to sue," the wife could do so; but I do not
 v. find that the Court anywhere laid down that such a refusal was a
 LARKIN. condition precedent to the wife's right of action.
 Andrews, J.

Several of the cases to which we have been referred were cited in *Gandy v. Gandy* (1); and in more recent decisions the principle there laid down has been adopted and applied. It was decided by a Court of the highest judicial eminence, and ought to be followed by us.

I need only deal very briefly with some of the cases which have been cited in argument. We do not question the authority of *Tweddle v. Atkinson* (2) as expounding the common law doctrine; the only question which we have to decide is whether the present case comes within the equitable exception to that doctrine. Neither *Clitheroe v. Simpson* (3), nor *M'Coubray v. Thomson* (4), which were cited on behalf of the defendant, applies. The facts in the former case were very simple. By a deed to which A and B alone were parties, A conveyed certain lands to B; part of the consideration being an undertaking by B to pay £100 to C. The payment was not to be made out of any ascertained fund or property. It was held that, as the deed did not create the relationship of trustee and *cestui que trust*, the personal representatives of C were not entitled to maintain an action for the money which remained unpaid at C's death. The facts in *M'Coubray v. Thomson* (4) were similar, and the decision was the same; but neither case applies to the facts now before us. The decision in *In re Empress Engineering Company* (5) does not cast any doubt upon that in *Gandy v. Gandy* (1). The case was decided upon other grounds; but Jessel, M.R., referred in his judgment to the question with which I am dealing; he said, at p. 129 of the report:—

"A mere agreement between A and B that B shall pay C

(1) 30 Ch. D. 57.

(4) I. R. 2 C. L. 226.

(2) 1 B. & S. 393.

(5) 16 Ch. D. 125.

(3) 4 L. R. Ir. 59.

(an agreement to which C is not a party either directly or indirectly) will not prevent A and B from coming to a new agreement the next day releasing the old one. If C were a *cestui que trust*, it would have that effect. I am far from saying there may not be agreements which may make C a *cestui que trust*." K. B. Div.
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And he instances the case of *Gregory v. Williams* (1), in which there was an agreement to pay a sum of money out of the proceeds of certain property, and it was held that the transaction amounted to a transfer of property with a declaration of trust in favour of a third party who was therefore held entitled to recover the sum covenanted to be paid.

The decision in *Gandy v. Gandy* (2) came before the Court of Appeal in this country in *Drimmie v. Davies* (3). It is true that in the latter case all the interested parties were before the Court, but the *ratio decidendi* of *Gandy v. Gandy* (2) was adopted in its entirety by the Court. At p. 189 of his judgment, Fitz Gibbon, L.J., referred with approval to the passage which I have already cited from the judgment of Bowen, L.J. : Walker, L.J. (p. 190), treats *Gandy v. Gandy* (2) as a "direct authority" : and the last paragraph of the judgment of Holmes, L.J., shows that he did not intend to throw any doubt upon it.

There appears to be no judicial decision showing that before bringing this action the plaintiff ought to have obtained from Richard Kelly an explicit refusal to sue, nor is there any legal principle which would oblige him to go through the round-about process of getting Richard Kelly to bring an action for his benefit. In our opinion, the present case comes within the equitable exception to the common law rule, because the plaintiff has a beneficial interest in portion of a particular earmarked fund, which, if received or recovered by the covenantee, could only be held upon trust for the plaintiff. We therefore think that the judgment of Kenny, J., must be set aside, and the action sent to a new trial,

(1) 3 Merivale, 582.

(3) [1899] 1 I. R. 176.

(2) 30 Ch. D. 57.

K. B. Div. which, in our opinion, is preferable to sending the case before the
1909. Master under the circumstances.

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BOYD and WRIGHT, JJ., concurred.

Andrews, J.

Solicitor for the plaintiff: *C. H. Monserrat.*

Solicitors for the defendants: *Dobbyn & McCoy.*

J. C. W.

GATTON, APPLICANT; LIMERICK STEAMSHIP CO.,
RESPONDENTS (1).

Appeal
1910.

May 9, 14.

Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1—Night watchman on board ship—Accidental drowning—Absence of direct evidence of circumstances under which accident occurred—Burden of proof—Finding on question of fact—Function of Appellate Court.

In a claim for compensation under the Workmen's Compensation Act the burden of proving that the accident arose both out of and in the course of the employment rests on the applicant, even when claiming as dependant on a deceased workman; and the County Court Judge's decision on questions of fact is conclusive, at least where upon the facts proved or admitted there are circumstances from which he could reasonably draw the inference on which his conclusion is based. Accordingly, where the evidence is as much consistent with the accident having arisen out of and in the course of the workman's employment as with the contrary, and the County Court Judge draws the inference that it did not so arise, and dismisses the application, the Court of Appeal cannot interfere with his decision.

The authorities on these points in England and Scotland considered.

APPEAL by the applicant from the decision of His Honour Judge Philip Law-Smith, County Court Judge of Limerick, dismissing the application.

The application was by Caroline Gatton, widow of and sole dependant on Henry Gatton, the deceased, for £249 12s. under the Workmen's Compensation Act. The deceased was quartermaster of the respondents on board their steamer "Gipsy," at a salary of £1 12s. a week. He disappeared on the night of the 2nd or morning of the 3rd November, 1908, while the steamer was at Hamburg Dock. His body was not recovered until 18th April, 1909, when it was found in Hamburg harbour; and it was alleged by the applicant that he fell overboard. The case was heard before the County Court Judge of Limerick,

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal.
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when the material evidence given as reported by him was as follows:—Martin Behan, a seaman on board the steamer, saw deceased on 2nd November, 1908; relieved him; on duty from 3.30 p.m. until 5 p.m. Deceased was to come on duty as watchman at 7 p.m. Witness turned in at 8 o'clock p.m., and heard nothing during the night. Deceased should have called him next morning, but did not do so. Witness saw a man's cap on No. 2 hatch; saw signal for shore ferry. Globe (of signal lamp) was very black, as if smoking for some time; saw it lighted at 7 o'clock night before, to get ferry alongside to take two men ashore. Very cold, frosty weather. Witness called the crew at 8.15 a.m. on the 3rd November; search was made for Gatton, but he could not be found. The ship's boat was made fast to a rope ladder. The cap was found 40 feet away from the boat.

The entry on ship's log (4, 11, '08) was as follows:—"On Tuesday morning, the 3rd November, Henry Gatton, A.B. and night watchman, could not be found on board. He had been seen several times during the night, and as late as 5 or 6 o'clock in the morning one of the firemen heard him, but after that we lost all trace of him. I reported the matter to the British Consul the next day, as the man had not turned up for duty the previous evening at 6 p.m. The man's cap was found on deck in the morning, and also signal for shore ferry was burning.

J. S. STEPHENS, *Master.*

C. HANRAHAN, *Mate."*

Hanrahan (Mate) deposed that he inspected ship before turning in on 2nd November. The riding light was the only light burning. Witness heard nothing during the night. The signal light was burning when he got on deck in the morning. Deceased's watch was twelve hours, 6 p.m. to 6 a.m. His duty was to look after ship, and to call the crew at 7 a.m. Witness made entry in log-book from information and inquiries on the spot. The person who said he heard deceased during the night was an Italian, not in the ship's employment. Night watchman should ask permission to leave ship or go ashore. Deceased did not ask permission to do so. This was deceased's first time as watchman.

Sailors frequently came on board at night. Cook sang out at 6.30. Witness did not see cook come on board. He cooked breakfast at 9 o'clock; he did not come on board by the ship's boat, but by another boat.

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The Judge found that the death of the deceased was not caused by accident arising out of and in the course of his employment, and dismissed the application.

It appeared that at an inquiry held before the British Consul, on the 13th May, 1909, the master reported that the death was presumably owing to accident; that the deceased had been several years at sea, and was competent for his duty; that the cause of death was drowning, and that no one was to blame for the accident. The certificate of death stated that the body was found in Hamburg harbour, April 18th, 1909, and that the cause of death was drowning.

Michael Comyn, for the appellant :—

Although, as a general rule, a claimant under the Workmen's Compensation Acts must affirmatively establish his case, yet on the facts existing here, and which are not in dispute, the onus of proof was shifted to the respondents. The deceased was a night watchman, and his duty might take him to any part of the ship. The case is really undistinguishable from *Grant v. Glasgow and South-Western Railway Co.*, 45 Sc. L.R. 128; [1908] Sess. Cas. 187 (1).

(1) The head-note of this case, as reported in the Sessions Cases, is as follows:—"A station policeman in the employment of a railway company was run down by an engine on a siding at the station, and died shortly afterwards of his injuries. His widow and children claimed compensation under the Workmen's Compensation Act, 1897, from the railway company. There was no evidence to show how or why he came to be at the spot where he was injured, but he might legitimately have been there in the course of his duties as station policeman. Held, that the deceased being station policeman, the presumption was that he had been injured by accident arising out of and in the course of his employment in the sense of sect. 1, sub-sect. (1), of the Workmen's Compensation Act, 1897, and that in the absence of evidence to the contrary this must be taken to be the fact." It appeared that part of his duties was to carry cash boxes to the bank at Ayr, and that it was in returning from delivering such cash boxes that he presumably went by the siding where the accident occurred.

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Phelps (with him, *Ronan, K.C.*), for the respondents :—

The onus in all these cases lies upon the applicant. In *Reed v. Great Western Railway Co.* (1), Lord Macnaghten says, at p. 33 :—“ It is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man’s employment, not upon the employer to prove the contrary.” Lord Gorell uses, at p. 542, similar language in his judgment in *Low or Jackson v. General Steam Fishing Co.* (2). Where admitted facts are capable of two equally possible views which may reasonably be taken, the selection of which of them is to be adopted is for the tribunal which is to judge of the facts : *Davey v. London and South-Western Railway Co.* (3). In *Marshall v. Owners of S.S. Wild Rose* (4) it was held that the unexplained drowning of a seaman engaged on board the ship did not *per se* raise any presumption that his death was caused by an accident within the Act of 1906. The finding of the County Court Judge on a question of fact is conclusive : *Eyre v. Houghton Main Colliery Co.* (5) ; even though the Appellate Court would (if permissible) come to a different conclusion on the facts.

Here there were four possible circumstances under which the death may have resulted, any one of which was consistent with the facts proved or admitted. First, suicide ; secondly, that deceased left the ship for his own convenience or pleasure ; thirdly, desertion ; fourthly, that he might have been conversing with some one in another boat. If the deceased man’s death was brought about under any one of these several circumstances, the case would not come within the Workmen’s Compensation Act. It is plain from Behan’s evidence that the signal light which was burning at 7 p.m. on the 2nd was extinguished at 9 p.m. ; and as the globe was found black and smoky on the following morning, it must have been re-lighted some time after 9 p.m. by the deceased. Is it unreasonable to infer that he signalled for the ferry to go ashore ?

(1) [1909] A. C. 31.

(4) [1909] 2 K. B. 46.

(2) [1909] A. C. 523.

(5) [1910] 1 K. B. 695.

(3) 12 Q. B. D. 70, per Bowen,

L.J., p. 76.

The possibility of suicide is quite admissible: *Bender v. Owners of S.S. Zent* (1), per Cozens-Hardy, M.R., p. 44. Even though it be admitted that death happened "in the course of the employment," that is not enough to entitle the applicant to compensation if the manner in which the accident actually happened is left unexplained: *Pomfret v. Lancashire and Yorkshire Railway Co.* (2); or if it is not shown affirmatively that it arose "out of" the employment: *McDonald v. Owners of S.S. Banana* (3); *Mitchell v. Glamorgan Coal Co.* (4): see judgment of Lord Gorell (then Sir Gorell Barnes), p. 589.

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Comyn, in reply:—

The cook must have come on board at 6.30 a.m. after deceased was last heard of. The case is quite different from *Marshall v. Owners of S.S. Wildrose* (5). The very distinction is clearly drawn by Farwell, L.J., in the illustration he gives at p. 50: "If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference may fairly be drawn that he died from an accident arising out of his employment." That is exactly what happened here. So in *Bender v. Owners of S.S. Zent* (1), Fletcher Moulton, L.J., says (p. 45): "There is no suggestion that any portion of this man's duty" (he was cook and baker) "would lead him into a position of danger at all." In *Rice v. Owners of the Ship Swansea Vale* (6), where the mate of a ship disappeared during his watch, the majority of the Court of Appeal held that it might be inferred that the accident causing his death arose out of as well as in the course of his employment. *Low or Jackson v. General Steam Fishing Co.* (7) is altogether, as a decision, in favour of the applicant.

THE LORD CHANCELLOR:—

May 14.

This was an application by Caroline Gatton, the widow of Henry Gatton, a seaman, who had been employed on board the steamship "Gipsy" as quarter-master, and was accidentally

(1) [1909] 2 K. B. 41.

(5) [1909] 2 K. B. 46.

(2) [1903] 2 K. B. 718.

(6) 26 T. L. R. 276.

(3) [1908] 2 K. B. 926.

(7) [1909] A. C. 523.

(4) 23 T. L. R. 588.

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drowned while the vessel was lying at Hamburg on the 2nd and 3rd November, 1908, under circumstances unexplained by direct evidence.

On the night in question the deceased was night watchman; his watch was till 6 a.m., and it would be a breach of duty on his part to leave the ship during his watch. There was a rope ladder from the ship with a wooden ring lying close to the ship; and the ship's boat was made fast to this ladder. Members of the crew who were on shore would come on board by a ferry-boat from the shore, and they would go ashore by it, and there was a signal shore light on a signal halyard between the fore and main mast. This signal light, from the appearance of the globe on the morning of the 3rd November, appeared to have been burning for a considerable time. Two of the crew came back to the ship at 1 o'clock a.m. At 8.15 a.m. on the 3rd the crew were called and search was made for Gatton, but he was not on board. His cap was found on deck a considerable distance, some 40 or 50 feet, from the ladder. The deceased had been heard on board during the night, and his duty was to call the crew at 7 a.m.

The entry in the ship's log was: "On Tuesday morning, the 3rd November, Henry Gatton, night watchman, could not be found on board. He had been seen several times during the night, and as late as 5 or 6 o'clock in the morning one of the firemen heard him, but after that we lost all trace of him. The man's cap was found on deck in the morning, and also signal for shore ferry was burning."

Hanrahan, the mate, swore: "I did not know that the watchman went on shore without leave. I never refused permission. This was deceased's first time as watchman. Behan had asked leave on other occasions." It appeared that the ship's cook, who was not available as a witness, came on board from the shore at 6.30 by a shore boat. The evidence as to this was: "The cook sang out at 6.30. The watchman might go and fetch him down the ladder and in the small boat. As far as I heard from other members of the crew, this was the last time the watchman was heard of. I did not see the cook come on board. He cooked breakfast at 9 o'clock. The cook did not come on shore by the ship's boat, but on another boat."

The body was found a considerable distance from where the ship lay.

On this evidence the County Court Judge made the following award: "I found as a fact that the death of the deceased was not caused by accident arising out of and in the course of his employment, and dismissed the application."

It was not disputed that the onus of proof in the first instance lay on the applicant; but it was contended that on the facts of this present case the onus of proof was so shifted that there was no evidence to support the finding of the County Court Judge, and that accordingly he had misdirected himself in law. The principal topics for the appellant were—the duty of the watchman not to leave the ship, the finding of his cap on board, and the fact, as was proved, that the deck was slippery and the rails and ropes of the ladder icy.

The question for us is not whether if the County Court Judge had found that the accident arose out of the employment we would have dissented from his finding in fact, but whether we can say that his actual finding is so unsupported by the evidence that there were no conceivable circumstances from which he could reasonably draw the inference he did. We were referred during the argument to several cases decided by the Court of Appeal in England, which have laid down principles that must guide us in arriving at a conclusion in the present case.

These cases begin with that of *Pomfret v. Lancashire and Yorkshire Railway Co.* (1), which has ever since been followed.

In all cases the onus is on the applicant to prove that the accident arose, not only in the course of the employment, but out of it. If the applicant leaves the case on the evidence in doubt as to the existence of conditions which would justify an award in his favour, or if the evidence is consistent with the presence or absence of such conditions, then he fails just as if the action were one for negligence.

A County Court Judge may draw an inference from facts which are proved, though there be no direct evidence; but there must be some facts to found the inference, and he is not at

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liberty to draw an inference from a presumption that a man was doing his duty till the contrary is proved.

The last proposition is stated in *McDonald v. Owners of the S.S. Banana* (1), and is pertinent to the present case. The principle has been applied where there was an unexplained drowning of a seaman engaged on board a ship: *Marshall v. Owners of S.S. Wild Rose* (2). There is an observation of Farwell, L.J., in that case with which, if I may so, I entirely agree, "If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment"; and if that was the case here *simpliciter*, and the County Court Judge had decided in favour of the applicant, I would as at present advised sustain his award.

In *Bender v. Owners of S.S. Zent* (3), it is laid down that the Court may find the accident arose out of the employment, though no human being was present who could give direct evidence as to how the accident happened, *i.e.* may draw an inference from facts proved; but it cannot be founded on guesses.

We cannot reverse the finding of the County Court Judge against the applicant if there were conditions reasonably conceivable under which the accident might have happened without arising out of the employment. I agree suicide cannot be presumed, because it is a crime.

The Scotch case of *Grant v. Glasgow and South-Western Railway Co.* (4) was strongly pressed; but that case was explained by the Master of the Rolls in *Bender's Case* (3), where he says, "That was the case of a policeman whose duty took him to all parts of the station premises to guard against theft, and pursue trespassers. Finding, as the Court did, that he was on the way to take money to the Bank, and was crossing the siding when the accident happened, the inference, I think, there was irresistible that the accident arose not only 'in the course of' his employment, but 'out of' it."

In this case we have at least one conceivable circumstance,

(1) [1908] 2 K. B. 926.

(2) [1909] 2 K. B. 46.

(3) [1909] 2 K. B. 41.

(4) 45 Scotch Law Rep. 128.

that when the boat from the shore came to the ship at 6.30 a.m. this sailor may have gone back on it to the shore—gone back for his own amusement or some purpose unconnected with his employment.

Having regard to the authorities and the finding of the County Court Judge, I do not think we would be justified in reversing his decision.

The appeal must be dismissed.

HOLMES, L.J.:—

The applicant seeks for compensation as the widow and sole dependant of Henry Gatton, a seaman employed on board the S.S. Gipsy, in November, 1908, and alleged to have been drowned by falling from the vessel into Hamburg Harbour on the 3rd of that month. It is proved that he went on duty as night watchman of the ship on the previous evening at 7 o'clock, and that his watch was to continue till 7 o'clock the following morning, when he was to call the crew. According to the entry in the log-book, he had been seen several times during the night, and was heard by one of the firemen as late as 5.30 or 6 a.m., after which all trace of him, except a cap to which I shall presently refer, was lost, until his body was found in the harbour in April, 1909. As he did not call the crew at the appointed time or at all, it is, I think, a reasonable inference that he had lost his life before his watch terminated; and the sole question for the County Court Judge was whether his death was caused by accident arising out of and in the course of his employment. It is well settled that the burden of establishing this issue rests on the applicant, and that where there is a total absence of evidence thereon, the Judge is not at liberty to find it in the affirmative.

The Lord Chancellor has referred to some reported cases on this subject, the authority of which cannot be disputed in this Court; but I am not prepared to hold that Judge Smith might not have drawn the inference from the evidence before him that this accident arose out of and in the course of the employment of the deceased. He was at liberty to accept the statement of the log-book that the deceased had been on duty up to the last hour of his watch; and if he was drowned during that hour, his death

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Appeal. can only be accounted for (a) by accident arising out of his
 1910. employment; (b) by accident when leaving or trying to leave the
 GATTON ship for his own business or pleasure; or (c) by suicide. I dismiss
 v. the last, as I cannot without proof impute to a man a crime: but
 LIMERICK there is some evidence to uphold either of the other alternatives,
 S.S. Co. and which is to be adopted is a pure question of fact.
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Anchored as the vessel was in the harbour, no one could reach the land therefrom except by boat; and the evidence satisfies me that on the night in question no boat belonging to the ship was used for this purpose. There was what was called a shore ferry that supplied a boat to carry persons from the vessel to the quay, and from the quay to the vessel, on being summoned by a signal light on board. Two of the crew went on shore in a ferry-boat so summoned in the evening of the 2nd November, and returned about 1 o'clock a.m. The ship's cook, who was absent during the night, came back about 6.30 a.m. in a boat which I would infer from the evidence responded to the signal lamp lighted by the deceased on hearing the cook's hail from the shore. If this be the reasonable inference, we have got the deceased on board the vessel and a boat alongside.

It is possible that the watchman, who had been doing duty during the night, resolving suddenly to desert his post, and to use this boat to reach the land for his own purposes, fell into the water while attempting to do so; but if this was what happened, he was leaving without his cap, which was found some distance away, lying on the hatch; and it is difficult to understand why the boatman, who must have seen the accident, did not give an immediate alarm. It was sworn that the deck was slippery, the rail icy, and there was ice near the rope ladder, which was the mode of descending to the boat. To some minds it would seem a reasonable inference from this evidence that the deceased, whose duty would bring him to every part of the ship, lost his footing in the dark and fell overboard, either when adjusting the rail and ladder after the boat had left, or at some other time. Still the question is one of fact, and it was for Judge Smith to say whether there was sufficient proof to entitle the widow to compensation. He held that there was not, and I must accept this finding. We have been referred to authorities in which a finding of fact has been set

aside on appeal upon the ground that the burden of proof rested on the appellant, and there was no evidence to support the finding of the Judge; but I know of no case resembling the present in which the appellate tribunal has reversed a negative finding on the ground that there was evidence on which he *might* have found the other way.

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I have dealt with this appeal more fully perhaps than was necessary; but I am anxious to make my own opinion clear that where a seaman is known to have during the greater part of a night been keeping his solitary watch in a ship, which could only be left by means of a boat in charge of a ferryman or boatman, is drowned before his watch has ended, the judge of fact *may* legally infer that the accident arose out of and in the course of his employment as night watchman.

CHERRY, L.J.:—

Counsel for the applicant in this case relied very strongly upon the decision of the Scotch Court of Sessions in *Grant v. Glasgow and South-Western Railway Co.* (1). I have read that case carefully, but I cannot see that it very much assists his argument. There it was proved that a railway policeman, in the employment of the defendants, lost his life by being run over by an engine on a railway siding. His duties were not solely those of a policeman. He was bound also, among other things, to act as a messenger, and upon the day of his death, during the hours of his duty, had been sent to the bank with cash for lodgment. In returning to the railway premises, where it was his main duty to be, he crossed a siding, where shunting was going on, and was run over and killed. It was proved in evidence that it was part of his duty to keep unauthorized persons off every part of the railway premises, and that in the discharge of that duty he was bound to visit every part from time to time. Indeed he could not discharge his duties without doing so. There was no evidence, however, for what particular purpose he went to the particular siding at the time of the accident. The Sheriff Substitute, who in Scotland has the same jurisdiction in cases under the Act as the County Court Judge with us, found as a fact that he met his

(1) 45 Sc. L. R. 128; [1908] Sessions Cases, 187.

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death through an accident arising out of and in the course of his employment, and awarded compensation to his widow. At the request of the company, however, he stated a case for the Court of Session as to whether, as a matter of law, he was entitled to presume and hold that the deceased man was at the particular spot for the discharge of his duties as a station policeman. The Court appeared to consider that there was really no question of law in the case at all, and answered the question merely by declaring that it had been proved that the accident arose out of and in the course of the employment of the deceased.

In some respects that case resembles that now before us; particularly in the fact that it did not involve any question of law at all. *Upon the facts*, the Sheriff Substitute there held that the accident arose out of and in the course of the employment of the deceased. *Upon the facts*, the County Court Judge here held that the death of the deceased was not caused by accident so arising. Now, it is clearly settled by all the authorities under the Workmen's Compensation Act, 1906, that questions of fact are for the arbitrator alone to decide. The rule is the same, in this respect, as it was under the earlier Act of 1897, under which it was distinctly laid down by the Court of Appeal in England in *Smith v. Lancashire and Yorkshire Railway Co.* (1). "Questions of fact," says A. L. Smith, L.J., in that case (at p. 143), "are not the subject of appeal. The County Court Judge has found the facts, and has relegated them to us, and we have to decide any questions of law arising on them." Rigby, L.J., in his short judgment was equally strong. "It is clear," he says (at p. 144), "that on this appeal we have nothing to do with the correctness or otherwise of the findings of fact." The very recent decision of the same Court under the present Act, in *Eyre v. Houghton Main Colliery Co., Ltd.* (2), is to the same effect. The question there arose as to the true construction of the words "suitable employment," and the case bore no resemblance in its facts to the one we have now to decide, but upon this question of the conclusiveness of the decision of the arbitrator upon questions of fact, provided there is evidence to sustain his finding, the decision of

(1) [1899] 1 Q. B. 141.

(2) [1910] 1 K. B. 695.

the Court was as strong as in the previous case I have mentioned. "For my own part," says Buckley, L.J. (at p. 701), "if it had been my duty to decide this case in the County Court, I should have decided it the other way; but it does not follow that I ought, therefore, to reverse the judgment of the learned judge. I have to see, first, whether he has misdirected himself as to the law, and secondly, whether he has determined the question of fact on proper evidence. If he has so determined it, it is not for me to review his finding."

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In the present case I have no hesitation in saying that I would have decided the case differently upon the facts had I been the County Court Judge; but I think we should be making a very bad precedent if we therefore reversed his decision. As was pointed out by Mr. Phelps in his clear and able argument for the respondents, there is really no case in which a decision of an arbitrator, under the Act, refusing to award compensation on findings of fact, has been reversed by the Court of Appeal. The only case in which this appears to have been done is that of *Mitchell v. Glamorgan Coal Co.* (1); but there the decision was in reality one of law rather than of fact. The workman whose finger was crushed afterwards died from blood-poisoning, and no evidence was given at the hearing of the application for compensation by his widow as to how or where the accident happened. It appeared only that he returned from work with the finger injured. The County Court Judge thought that he was not at liberty to draw the inference from the facts proved that the accident occurred in the course of his employment at the colliery, as it might conceivably have occurred on his way home; but he reported that if he had been at liberty to draw such an inference from the evidence, he would have done so, as his belief was that it did occur in the course of his work. The Court of Appeal held that, *as a matter of law*, he was entitled to draw the inference, and accordingly reversed his formal decision. Kennedy, L.J., in giving judgment, said that the learned County Court Judge had taken a mistaken view on a point of law which had prevented him from considering the case

(1) 23 T. L. R. 588.

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according to the right standard. It is sufficient for me to say that in the present case we have no such report from the County Court Judge, and no suggestion from him that he felt himself coerced by any legal principle to decide as he did against his own belief. However strongly we may be of opinion that he was entitled to draw the same inference from the facts as was done in the case of *Mitchell v. Glamorgan Coal Co.* (1), we cannot direct, as a matter of law, that he was bound to draw the inference. A great deal was said in the course of the arguments as to the *onus probandi* in cases under the Workmen's Compensation Acts. Upon this question there is some conflict between the English and Scotch decisions. In England it has been laid down in the most absolute terms that the entire burden of proof is upon the applicant, that that burden is not discharged if the manner in which the accident happened is left wholly unexplained, and if the evidence is equally consistent with the view that it happened in consequence of something which did not arise out of the employment. Such was the decision of the Court of Appeal in *Pomfret v. Lancashire and Yorkshire Railway Co.* (2). "The burden, and the whole burden," says Collins, M.R., in that case (at p. 721), "of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else; and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him." It may be that this rule acts somewhat harshly in cases where the workman has been killed, and the claim is by a dependant upon him, who is in most cases not in a position to prove how the accident occurred. In Scotland, it has been held that although the *onus probandi* in the first instance is upon the applicant, it may be shifted by circumstances to the employer, especially where the claim is by a dependant of a workman who has been killed, and whose evidence is therefore not available. "If in such a case," says Lord Low, in *Grant v. Glasgow and South-Western Railway Co.* (3),

(1) 23 T. L. R. 588.

(2) [1903] 2 K. B. 718.

(3) [1908] Sessions Cases, p. 187.

"facts are proved the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think that it falls upon the employer, if he disputes the claim, to prove that the contrary was the case." In the very recent cases in England, however, the Court of Appeal have refused to adopt this principle of the shifting of the onus, and have adhered to their own decision in *Pomfret v. Lancashire and Yorkshire Railway Co.* (1). In *Bender v. Owners of Steamship Zent* (2), Farwell, L.J., says (at p. 45), "The onus of proving his case is as much on the executors of a deceased workman as on a living one who has been injured"; and in the similar case of *Marshall v. Owners of Steamship Wild Rose* (3), the same Judge says (at p. 50), "It is perfectly plain from the decisions of the House of Lords as well as of this Court that the onus is on the claimant to make out his case. He has to prove affirmatively that he brings himself within the Act."

Having regard to these decisions, we should not, I think, be justified in holding that there is any difference, as to the *onus probandi*, between cases where the evidence of the workman is not available owing to his death, and cases where he can himself be examined. The statement of Lord Low in *Grant's Case* (4) must be regarded as a mere dictum, for the decision of the Court was merely a declaration that it had been proved that the accident arose out of and in the course of the deceased's employment. The rule of law must be the same in both cases, though possibly the tribunal which determines the facts may be more liberal in drawing inferences of fact in the one case than in the other. The decision of the Court of Appeal in *Mitchell v. Glamorgan Coal Co.* (5) would, I think, have justified the County Court Judge in the present case in drawing the inferences of fact that the deceased died by accident, and that the accident arose out of and in the course of his employment; but he has not done so. He has come to the very opposite conclusion, and we cannot compel him to decide otherwise than he has done. Nor can we, consistently with

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(1) [1903] 2 K. B. 718.

(2) [1909] 2 K. B. 41.

(3) [1909] 2 K. B. 46.

(4) 45 Scotch Law Rep. 128.

(5) 23 T. L. R. 588.

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the authorities, take the decision upon the facts out of his hands, however much we might desire to do so. .

In conclusion I may say that I cannot see how the recent case in the House of Lords, *Low or Jackson v. General Steam Fishing Co.* (1), upon which Mr. Comyn relies, in any way supports his argument, for there the arbitrator, the Sheriff Substitute, had found as a fact that the accident arose out of and in the course of the deceased's employment. The House of Lords merely decided that there was evidence to sustain this finding. On the question of onus of proof, which did not, however, directly arise in the case, Lord Atkinson lays down the rule that it rests upon the applicant in the same general terms as were used by the Judges of the Court of Appeal in the cases I have referred to. He did not even suggest that there was any difference between cases where death occurs and where it does not. Upon the question of *onus probandi*, therefore, as well as upon that of the exclusive jurisdiction of the tribunal of first instance upon questions of fact, the most recent decision of the House of Lords is as much against the applicant's contention here as the decisions of the Court of Appeal.

Solicitor for the applicant : *P. J. O'Sullivan.*

Solicitors for the respondents : *Connolly & Co.*

W. G.

KEOGH v. THE INCORPORATED DENTAL HOSPITAL *K. B. Div.*
OF IRELAND (1). 1910.

June 3, 7, 8,
23.

(1909. No. 3860.)

Libel—Words not libellous per se—Withdrawal of case from jury—Publication—Letter addressed to plaintiff, and opened by his clerk—Privilege.

The plaintiff, who had for a number of years practised dentistry though not registered as a dentist, applied to the defendants to be admitted as a dental student at their hospital. The defendants' committee passed a resolution in the following words: "Resolved—that Mr. Keogh cannot be accepted as a student at this hospital, the committee having the right by their by-laws to refuse any student without assigning a cause." A copy of this resolution was sent to the plaintiff in a letter addressed to him. It was opened, and the copy of the resolution read, by the plaintiff's assistant, whose practice was to open plaintiff's letters in his absence. The plaintiff brought an action for libel. No extrinsic evidence was given to show that the words had a libellous tendency. There was no evidence that the defendants knew of the practice as to the plaintiff's assistant opening his letters.

Held, that the words were not *per se* libellous, and that a verdict was rightly directed for the defendants.

Capital and Counties Bank v. Henty (7 A. C. 741); *M'Cann v. Edinburgh Roperie Co.* (28 L. R. Ir. 24, 35); and *O'Hea v. Guardians of Cork Union* (32 L. R. Ir. 629), applied.

Held, also, by Lord O'Brien, L.C.J., and Dodd, J., that there was no evidence of a publication for which the defendants could be made responsible.

Per Dodd, J.: The communication if published, and if defamatory, was privileged.

NEW TRIAL MOTION.

The action was for libel. The statement of claim set out *inter alia* that, in the year 1908, the plaintiff applied to the defendants to be admitted as a dental student to the dental hospital of the defendant company; that a correspondence ensued between the plaintiff and the defendants' registrar in reference to the application; and that on the 20th October, 1908, the registrar wrote to

K. B. Div. the plaintiff, informing him that the committee of the defendant
 1910. company had on the 18th May, 1908, passed a resolution declining
 KEOGH to allow the plaintiff to become a student at their hospital. That
 v. the plaintiff applied to the defendant company's officer for a copy
 DENTAL of that resolution, and same was forwarded to the plaintiff. The
 HOSPITAL. libel complained of was set out in the statement of claim as
 follows:—"The defendants falsely and maliciously wrote and
 published of and concerning the plaintiff on the 18th May, 1908,
 the words following: 'Resolved—that Mr. Keogh' (meaning the
 plaintiff) 'cannot be accepted as a student at this hospital' (mean-
 ing the dental hospital of the defendant company), 'the committee
 having the right by their by-laws to refuse any student without
 assigning a cause.'"

The statement of claim alleged the following innuendoes:—

- (a) "By the said words the defendant company meant and intended, and would be understood by any dentist or other person having knowledge of the practice in Ireland of admission to the dentist profession in Ireland to mean, that the plaintiff was a man who was unfit and unworthy to attend the lectures at the defendant company's dental hospital, and was not a proper person to be admitted as a student into said hospital, or to attend the lectures given at the said hospital for dental students." (b) "By the said words the defendant company meant and intended, and would be understood as aforesaid to mean, that the plaintiff was a disreputable person and unfit to attend lectures at the said hospital, and was a man unfit to be allowed to qualify for the position of a duly registered and qualified dentist." (c) "Meaning thereby that the plaintiff was a person of so improper and unworthy a character as to be unfit to be a qualified and registered dentist."

The defendants in their defence denied the writing or publishing of the words alleged in the statement of claim. They also pleaded that the words complained of were not written or published with, neither did they bear, nor were they capable of bearing, the meanings or any of them ascribed in the statement of claim, or any defamatory interpretation whatsoever. That the words complained of were no libel. That the publication (if any) was made *bona fide* and in the belief that the words were true, and without malice, and on a privileged occasion.

The plaintiff joined issue on the defendants' statement of defence. *K. B. Div.*
1910.

The action was tried before the Lord Chief Baron and a special jury of the County of the City of Dublin. The following matters were proved or admitted :— KEOGH
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The defendants were an incorporated company, incorporated on the 27th January, 1899, under the Companies Acts, 1862 to 1893, and their memorandum of association stated that amongst other things the object for which the company was formed was for the purpose of carrying on a dental hospital in Ireland for the treatment of diseases of the teeth, and also to establish a school or schools of dentistry in connexion with the said hospital and to provide lectures and accommodation for teaching and training dental pupils from time to time attending such school. In pursuance of the memorandum of association, the defendant company duly established a school of dentistry and provided lectures for dental students. There was no obligation on the defendants under the articles of association to receive as a student any person whom they did not desire to receive as such. One of their rules and by-laws stated that the staff of the dental hospital reserved the right of accepting or rejecting without cause shown any application from a pupil to attend the dental hospital. The plaintiff, who had for a number of years practised dentistry, though not a registered dentist, wrote on the 9th April, 1908, to the defendants' registrar, requesting to be admitted as a second-year student at their hospital, on the ground that he had been a student for the year 1894-1895 at the Dental Hospital in Dublin which was taken over by the defendants when they were incorporated. On the 19th May, 1908, the registrar wrote to the plaintiff stating that his letter had been under the consideration of the committee of management, and that they could not see their way to comply with the request. On the 13th July, 1908, the plaintiff wrote to the registrar requesting that the committee should admit him as a first-year's student. A correspondence followed between the plaintiff and the registrar, and on the 20th October, 1908, the registrar wrote to the plaintiff :—" In reply to your letter which was before the committee of management, and considered last evening, I am directed to give you a copy of the

K. B. Div. resolution passed at their meeting held the 18th May dealing
1910. with a similar matter, and to say the committee see no reason to
KEOGH depart from that decision." On the back of this letter was a copy
v. of the resolution referred to, which was in the terms set out in
DENTAL the statement of claim.
HOSPITAL.

The further evidence given at the trial, so far as material for the purpose of the present report, was set out in the report of the Lord Chief Baron as follows:—

"First witness for plaintiff, Myles Keogh, the plaintiff: '... I first learned of the resolution of the 18th May, 1908, in October, 1908. In the interval no communication was made to me in reference to that resolution. A [I have been in the habit for the last fifteen years and to the present of employing a gentleman of the name of Kelly.' (This evidence is objected to by Mr. Healy and received subject to objection.) 'I have extern work, and am often obliged to be absent from my house. I attend institutions round Dublin. The practice is, that when I am absent my clerk, Mr. Kelly, opens my letters.' (Letter, 20th October, 1908, from Mr. Shea, the defendants' registrar, to the plaintiff with copy resolution of 18th May, 1908, on the back of it, read.) 'When I returned to my office on the day the letter of the 20th October was received, it was open.' (Envelope produced.) 'Mr. Kelly handed it to me open.' B. (Evidence from A to B objected to by Mr. Healy.) 'No reason was ever given to me either verbally or in writing by the defendants for passing that resolution. My having Mr. Kelly there is necessary in the ordinary management of my business.' The plaintiff was not cross-examined."

"Second witness for plaintiff, Thomas Kelly: All the evidence of this witness was objected to by Mr. Healy and received subject to the objection. 'I am, and have been for the last fifteen years, in the plaintiff's employment. It is my duty to open his letters in his absence. On the 21st October, 1908, this letter of the 20th was delivered in the ordinary course of post. The plaintiff was not in at the time. I opened it, and read it and the copy resolution.'

"Third witness for the plaintiff, Mr. Joseph Thomson: 'In May, 1908, I was a member of the Committee of the Dental

Hospital. I was present when the resolution of the 18th May, 1908, was passed. We made rules under our Articles of Association.' Witness is asked by Mr. Campbell, K.C., 'what passed at the meeting?' Mr. Healy, K.C., objected to the question on the ground that the defendants were not bound to disclose their reasons for refusing to receive the plaintiff as a student, and that the question was an effort to compel them to disclose such reasons. I was of opinion that as the evidence stood the plaintiff was not entitled to obtain a disclosure of the reasons upon which the defendants acted, and that the question was so general in its form that a ruling that it was admissible would necessarily be a ruling that the plaintiff was entitled to interrogate the witness as to those reasons. I was further of opinion that, having regard to the evidence which had been given, it was impossible that the plaintiff could obtain a verdict, whatever might be the answer to the question. My reason for being of this opinion was that the only publication having been to Kelly, there was not, notwithstanding his evidence, any evidence fit to be submitted to the jury that the resolution bore any of the meanings attributed to it by the statement of claim, or any defamatory meaning." The Lord Chief Baron referred to *Capital and Counties Bank v. Henty* (1); *McCann v. Edinburgh Ropery Co.* (2); and *O'Hea v. Guardians of Cork Union* (3). His report went on to say that he stated that if the witness objected to answer the question he would decline to compel him to do so, and the witness having so objected the evidence was not given. The plaintiff's counsel objected to this ruling.

The plaintiff's case then closed, and Healy, K.C., for the defendants asked for a direction on the following grounds:—
1. That there was no evidence fit to be submitted to the jury of publication of the alleged libel. 2. That the occasion of the alleged publication was a privileged one, and that there was no evidence fit to be submitted to the jury of malice in the defendants. 3. That there was no evidence fit to be submitted to the jury that the resolution was capable of bearing the meanings attributed to it, or any defamatory meaning whatsoever.

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(1) 7 A. C. 741. (2) 28 L. R. Ir. 24, 35. (33) 32 L. R. Ir. 629.

K. B. Div. As to the first ground, Campbell, K.C. cited *Gomersall v.*
 1910. *Davies* (1).

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The report of the Lord Chief Baron concluded as follows:—

“I was of opinion that the defendants were entitled to a verdict upon the third ground put by Mr. Healy, and stated that on that ground I should direct a verdict for them. I was also of opinion that the defendants were entitled to a direction upon the first ground relied upon by Mr. Healy. I thought the case differed from *Gomersall v. Davies* (1), because in my opinion there was no evidence upon which the jury could reasonably find that the defendants, when they wrote the letter of the 20th October, knew, or as between them and the plaintiff ought to have known, that that letter would be opened by a third person. Had I not, however, been of opinion that the defendants were entitled to a direction upon the third ground (that as to the innuendo), I should have left to the jury, although with some doubt, the question of publication, in order to avoid a second trial in the event of the Divisional Court differing from my view. I formed no opinion upon the second ground relied upon by Mr. Healy, largely in consequence of my ruling as to the evidence of Mr. Thomson. I consequently directed a verdict for the defendants, and the jury found for them accordingly.”

The present application was on behalf of the plaintiff for an order that the verdict and judgment for the defendants should be set aside and a new trial had.

The Right Hon. J. H. Campbell, K.C. (with him, *Denis S. Henry, K.C., Jefferson, K.C., and Joseph O'Connor*), for the plaintiff:—

The words of the resolution are not capable of any meaning except a defamatory one. The only meaning the ordinary reasonable man would put on the words would be that the plaintiff, for some reason personally discreditable to him, was unfit to be admitted as a student. This distinguishes the present case from cases such as *Capital and Counties Bank v. Henty* (2); *M'Cann v. Edinburgh Roperie Co.* (3); *O'Hea v. Guardians of Cork Union* (4); and *Nevill v. Fine Art and General*

(1) 14 T. L. R. 430.

(2) 7 A. C. 741.

(3) 28 L. R. Ir. 24, 35.

(4) 32 L. R. Ir. 629.

Insurance Co. (1). All that these cases decide is, that where the words are equally capable of an innocent or of a defamatory meaning, the case should be withdrawn from the jury. The test is whether, under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense: *per* Lord Selborne, L.C., *Capital and Counties Bank v. Henty*, p. 745 (2).

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There was evidence of publication, and that question ought to have been submitted to the jury. The defendants knew that the plaintiff was carrying on the business of a dentist. They might reasonably assume that he had an assistant, or clerk, who would open his letters in his absence from Dublin on professional business. In such case the reading of the letter by the assistant is a publication: *Gomersall v. Davies* (3); *Delacroix v. Thevenot* (4); *Pullman v. Hill and Co.* (5); *Boxsius v. Goblet Freres* (6); *Edmundson v. Birch and Co., Limited*, and *Horner* (7). It may be that the defence of privilege would be open to the defendants in such case; but we wished to examine Mr. Joseph Thomson as to what took place at the meeting of the committee when the resolution was passed, with the object of showing express malice, and this was disallowed by the Lord Chief Baron; so that, if the defence of privilege is to be relied on, there must be a new trial.

Healy, K.C., and Chambers, K.C. (with them *W. G. Gibson*), for the defendants:—

No evidence was given to sustain any one of the innuendoes alleged in the statement of claim. Where words are capable of either an innocent or a defamatory meaning, and no evidence is given in support of the defamatory meaning, the Judge must withdraw the case from the jury: *Capital and Counties Bank v. Henty* (2); *Frost v. London Joint Stock Bank* (8). The words here are capable of an innocent meaning. [Lord O'Brien, L.C.J.: Might they mean that the defendants refused to accept the

(1) [1897] A. C. 68.

(2) 7 A. C. 741.

(3) 14 T. L. R. 430.

(4) 2 Stark. 63.

(5) [1891] 1 Q. B. 524.

(6) [1894] 1 Q. B. 842.

(7) [1907] 1 K. B. 371.

(8) 22 T. L. R. 760.

K. B. Dir. plaintiff as a student, because he had pursued methods which, though not illegal, the defendants did not approve of?] Yes, or because he had not complied with some of the regulations necessary for admission. The statement that the committee were not bound to assign a cause was for the purpose of making known to the plaintiff the power of the committee in this respect, and saving him the trouble of asking for the reason of the refusal. Where words are capable of an innocent meaning, you cannot infer a defamatory one. "The defamer is he who of many inferences chooses a defamatory one": *per* Lord Bramwell, *Capital and Counties Bank v. Henty* (1).

There was no evidence fit to be submitted to the jury of publication by the defendants of the alleged libel. There was nothing to show that the defendants knew, or ought to have known, that the plaintiff had an assistant who opened his letters in his absence. In *Delacroix v. Thevenot* (2), there was evidence that the defendant knew the clerk was in the habit of opening the plaintiff's letters. In *Gomersall v. Davies* (3) the jury found that the plaintiff's business was such that to the defendants' knowledge letters addressed to the plaintiff would be likely to be opened by persons in the plaintiff's employment. There was no evidence of such knowledge in the present case. The presumption is all the other way. A long correspondence had passed between the plaintiff and the defendants' registrar prior to the sending of the copy of the resolution, and there was nothing to show that the plaintiff's letters were written by anyone but himself, or that letters written to him were opened by anyone but himself. In *Pullman v. Hill and Co.* (4), the letter was addressed to a business firm in the name of the firm. In such case the defendants might reasonably anticipate that it would be opened by a clerk. The case of a letter written by a dental hospital to a person seeking admission as a student is a very different one. The plaintiff himself invited the communication, and must therefore take the consequences: *Padmore v. Lawrence* (5).

(1) 7 A. C., at p. 792.

(4) [1891] 1 Q. B. 524.

(2) 2 Stark. 63.

(5) 11 A. & E. 380.

(3) 14 T. L. R. 430.

Even assuming that the reading by the plaintiff's assistant of the copy of the resolution, sent in the letter of the 20th October, was a publication, the plaintiff cannot rely on this. The only publication alleged in the statement of claim was the passing of the resolution on the 18th May, and it was in respect of this publication the defendants pleaded privilege. The defendants applied to the plaintiff for particulars of the publication complained of. The plaintiff declined to furnish the particulars, and a motion by the defendants to compel him to do so was refused by the King's Bench Division, and this decision was affirmed by the Court of Appeal: *Keogh v. Dental Hospital* (1). On that motion the only publication relied on by the plaintiff, or dealt with by the Court, was the passing of the resolution on the 18th May. There was no suggestion of a subsequent publication in the letter opened by the assistant. [Dodd, J.—This might have been a good point, if it had been made at the trial.] *Healy, K.C.*—At the trial I objected to all the evidence as to the opening of the letter by the assistant.

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Jefferson, K.C., in reply, referred to *Duke of Brunswick v. Harmer* (2); *Cox v. Lee* (3); *Cooney v. Edeveain* (4); *Bower on Actionable Defamation*, p. 42, note m; *Encyclopædia of English Law*, 2nd ed., vol. iv., p. 469.

Cur. adv. vult.

LORD O'BRIEN, L.C.J.:—

June 23.

The questions arising in this case may be shortly stated. The plaintiff, Mr. Keogh, having for some years, though not a dentist, practised at dentistry work, applied to be admitted as a student to the Incorporated Dental Hospital in this city. The hospital authorities refused to accept him as a student, and by their secretary wrote to him a letter enclosing the following resolution: [His Lordship read the resolution.] It appears that this letter when it reached the house of the plaintiff was, in his absence, opened by a clerk who, when the plaintiff was absent, was, with

(1) [1910] 2 I. R. 166, 171.

(3) L. R. 4 Ex. 284.

(2) 14 Q. B. 185.

(4) 14 T. L. R. 34.

K. B. Div. his consent, in the habit of opening letters addressed to him.
1910.

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Lord O'Brien,
I.C.J.

As to this practice the defendants knew nothing. The resolution is the alleged libel, and the opening of the letter and the reading of it by the clerk is the publication complained of. Was the resolution a libel, and was there a publication of it by the defendants under the circumstances I have referred to? I am of opinion that the resolution was not a libel, and that the defendants were in no way responsible for the alleged publication. The resolution states that the defendants could not accept the plaintiff as a student. So far, this is not libellous, because it would not of itself reasonably convey to any reasonable, fair-minded man that the plaintiff did anything of an illegal or defamatory character. I assume that the person who reads the alleged libel is a reasonable, fair-minded man. I am considering what might be conveyed by the letter to a reasonable, fair-minded man, and not what might be inferred from it by a man with a morbid or suspicious mind. The refusal to accept the plaintiff as a student by the Dental Hospital might be due to the fact that the plaintiff had recourse to methods which, though not illegal in themselves or importing anything of a defamatory character, were nevertheless disapproved of by the defendants. And the statement that a rule, a by-law, existed authorizing the non-disclosure of the reasons for refusing to accept an applicant as a student, would certainly not convey to any reasonable mind the existence of anything defamatory. Such a rule might have been reasonably established to prevent unreasonable importunity for admission, or importunity to be supplied with the reasons for non-admission, to the hospital. The rule was a general rule, and compliance with it did not involve any imputation of a defamatory character on a particular candidate for admission. However, I think it is plain that the making of such a rule or by-law was quite within the competence of the defendants; that for many reasons it was a wise rule to make; and that a reference to such rule was a courteous explanation for not giving the reasons upon which refusal to admit to the hospital were founded. Most certainly the so-called libel is not in itself *necessarily* defamatory; and, if the alleged libel, the impugned document, might convey to say two reasonable men different meanings—to one a defamatory

meaning, to the other a non-defamatory meaning, *Henty's Case* (1) decides that if a document is reasonably capable of an innocent or defamatory meaning, of a libellous or non-libellous meaning, the Judge should direct a verdict for the defendant. Applying this principle to the present case, I think the case was properly withdrawn from the jury.

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As to the publication, I think there was no evidence fixing responsibility upon the defendants. No doubt they may have known that the plaintiff practised dentistry work, but they did not know, nor might they have known, nor was there any presumption that they knew, that the plaintiff had a clerk who, in his absence, was authorized to open letters addressed to him. The very reasons which prevailed to make the defendant responsible for publication in *Delacroix v. Thevenot* (2), and in *Gomersall v. Davies* (3), go to show that the defendants in this case were not, in the absence of those reasons, responsible for the publication here.

Henty's Case (1) is an authority for the defendants, and so I might say *a fortiori* is the case of *O'Hea v. Guardians of Cork Union* (4), which was not appealed from and is binding on us.

MADDEN, J. :—

I deal with this case on the assumption that there was evidence proper to be submitted to the jury of publication by the defendants of the alleged libel on the 21st of October, 1908, when it was read by Mr. Kelly in the absence of the plaintiff. I am far from being satisfied that this is so, but in the view which I take of the case it is unnecessary for me to come to a conclusion on this point. Reading the document in view of what I have assumed to be its publication, what meaning was it reasonably calculated to convey? It is in these terms:—"Resolved—that Mr. Keogh cannot be accepted as a student at this hospital, the committee having the right by their by-laws to refuse any student without assigning a cause." By reading this document, Mr. Kelly learned that his employer had been rejected as a student, that there was a cause for his rejection, and that the committee availed

(1) 7 A. C. 741.

(2) 2 Stark. 63.

(3) 14 T. L. R. 430.

(4) 32 L. R. Ir. 629.

K. B. Div. themselves of the right which they enjoyed of declining to inform
 1910. him of the cause of his rejection. This, I think, is the natural
KEOGH meaning of the words. It is the meaning which would naturally
v. be attributed to them by the average reasonable man. There is
 DENTAL certainly nothing in the words themselves, so read, to hold up or
 HOSPITAL. expose the plaintiff to hatred, contempt, or ridicule, and it follows
 Madden, J. from the decision of the House of Lords in *Capital and Counties*
Bank, Ltd., v. Henty (1) that the onus rests on the plaintiff of
 proving that the resolution had a libellous tendency. There is
 certainly nothing in the circumstances of the publication either
 on the 18th May or the 21st October to warrant this conclusion,
 and the argument on behalf of the plaintiff proceeded on a
 different ground.

It was suggested as a conclusion that might reasonably be drawn from the wording of the resolution that the applicant had been rejected as a student for a cause personal to himself, the reason being of such a character as to render it advisable for the committee to shelter themselves under the protection of the by-law. It is quite possible that some such idea might present itself to the mind of a reasonable reader of the resolution. But such an idea would be the result, not of the interpretation of the written words, but of an inference drawn by the mind of the reader. The words of Lord Watson in *Capital and Counties Bank v. Henty* (1) appear to be here precisely in point: "If I am satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to any person of average intelligence on reading the circular, I should hold it had a libellous tendency, although the language used is not in itself libellous. But besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent." In the present case there are many innocent inferences, besides the injurious one, which might

(1) 7 A. C. 741, 788.

reasonably present themselves. The proposed student might not have complied with certain conditions or regulations. If this were all, it would seem strange that the cause of rejection should have been withheld; but here we come to the region of conjecture and inference, not of interpretation. Or he might be one of a class of practitioners which the committee regarded as ineligible. This was suggested in argument as the real reason on which the committee acted. I do not know how this may be. It is at all events a reasonable inference to be drawn from the resolution. But this does not render it defamatory as regards the plaintiff personally. The general rule adopted may be unwise or illiberal—with this we are not concerned. In my opinion, this case is governed by the principles laid down by the House of Lords in the case to which I have referred, and was rightly withdrawn from the jury.

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Madden, J.

Dodd, J. :—

I concur, and for the reasons given. The plaintiff's case is a sieve. It is all holes.

I do not think it was open on the pleadings for the plaintiff at the trial to rely on the publication to the plaintiff's clerk. By taking issue on the plea of privilege he must be taken as admitting that the defendants had correctly hit the cause of action, and without fresh pleading he could not fall back upon any other publication: *Roger v. Custance* (1), and similar cases.

If this point is not open here as not having been strenuously pressed at the trial, what is the publication now relied on? The facts are set out in paragraph 9 of the statement of claim. "The plaintiff applied to the defendants for a copy of that resolution, and same was forwarded to the plaintiff."

A communication sent by the defendants, at his own request, to the plaintiff, to the address given by him, though in fact opened by an assistant of the plaintiff, of whose existence or duties it is not proved the defendants had any knowledge, is not in my opinion a publication: *Smith v. Woot* (2).

(1) 2 M. & Rob. 179.

(2) 3 Camp. 323.

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Dodd, J.

But what is the resolution? "Resolved—that Mr. Keogh be not accepted as a student at this hospital, the Committee having a right by their by-laws to refuse any student without assigning a cause."

Assume that the undisclosed cause in fact was, that a gentleman who had practised dentistry for so many years, outside the profession, was not in the opinion of the Board a suitable person to be accepted as a student, is that necessarily defamatory? Is it not even capable of being considered a compliment to his success? There are many other innocent inferences that might be drawn. In fact, *Regulations for Students* are altogether inapplicable to a gentleman of Mr. Keogh's years and experience.

I agree that the facts bring the document within the principle of *Henty's Case* (1); of *M'Cann's Case* (2); and *O'Hea's Case* (3), and I prefer to base my decision on that ground.

The communication, if published, and if defamatory, was in my opinion privileged. It is sought to press *Pullman v. Hill* (4) too far. The facts bring this case within the principle of *Edmondson v. Birch and Co.* (5), in which *Pullman's Case* (4) is put upon its true grounds, and do not bring it within *Gommersall v. Davies* (6).

Solicitor for the plaintiff: *Reuben J. Dodd.*

Solicitors for the defendants: *Orpen and Sweeney.*

J. G. T.

(1) 7 A. C. 741.

(2) 28 L. R. Ir. 24, 35.

(3) 32 L. R. Ir. 745.

(4) [1891] 1 Q. B. 524.

(5) [1907] 1 K. B. 371.

(6) 14 T. L. R. 430.

ERAUT v. ROSS BROS., LIMITED (1).

K. B. Div.
1910.

May 5.

Factories where wet spinning carried on—Humidity—Accommodation for workers' clothing—Regulations of 26th February, 1906—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79.

Regulation 11 of the Regulations of 26th February, 1906, made under section 79 of the Factory and Workshop Act, 1901, which requires that occupiers of factories in which wet spinning is carried on shall provide suitable and convenient accommodation "in which" to keep the clothing of the workers taken off before starting to work, does not impose an obligation on such occupiers to have a separate cloak-room outside the work-room.

What is "suitable and convenient accommodation" is a question of fact in each particular case. In the case of buildings erected before 30th June, 1905, it does not necessarily follow as a matter of law that if such accommodation is provided in a workroom it must take the form of a press or wardrobe.

CASE STATED by Justices under 20 & 21 Vict. c. 43.

Section 79 of the Factory and Workshop Act, 1901, provides that—"Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops, is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case." In pursuance of this section the Secretary of State duly made and issued regulations dated the 26th February, 1906, No. 11 of which was as follows:—"There shall be provided for all persons employed

K. B. Div. in any room in which wet spinning is carried on, or in which
1910. artificial humidity of air is produced in aid of manufacture,
ERAUT suitable and convenient accommodation in which to keep the
v. clothing taken off before starting work; and in the case of a
ROSS. building erected after 30th June, 1905, in which the difference
between the readings of the wet- and dry-bulb thermometers is at
any time less than four degrees, such accommodation shall be
provided in cloak-rooms ventilated and kept at a suitable
temperature, and situated in or near the work-rooms in question."

The defendants were prosecuted for neglecting to observe the provisions of this regulation, "in that suitable and convenient accommodation, in which to keep the clothing taken off before starting to work, was not provided" in their factory for persons then employed in a certain weaving-room therein, in which artificial humidity of air was then being produced in aid of manufacture. The defendants had provided pegs in the open weaving-room in question on which to hang the clothes of the employees. It was contended by the prosecution that this was not a sufficient compliance with regulation No. 11. Upon the hearing the magistrates, on the evidence before them, found as a fact that these pegs constituted a suitable and convenient accommodation as required by this regulation, and they accordingly dismissed the case on the merits; but, at the request of the complainant, stated a case for the opinion of the King's Bench Division.

The following is a copy of the case stated :—

"This is a case stated for the opinion of His Majesty's High Court of Justice in Ireland, King's Bench Division, at the instance of the complainant, pursuant to the provisions of an Act to improve the administration of the law so far as respects summary proceedings before Justices of the Peace (20 & 21 Vict. c. 43).

"At a Petty Sessions holden in and for the Petty Sessions District of Belfast, on Friday, the 31st day of December, 1909, before us, the undersigned Justices of the Peace, acting in and for the said county of the city of Belfast, in the Petty Sessions District aforesaid, Ross Brothers, Limited, the above-named defendants, were charged in and by a certain summons for that

they, on the 28th day of October, 1909, at Bloomfield, Belfast, in the city of Belfast, were then and there the occupiers of a certain factory within the meaning of the Factory and Workshop Act, 1901, wherein, on the said date, the said factory was subject to certain regulations made in pursuance of section 79 of the above Act, for the processes of spinning and weaving flax and tow, and the processes incidental thereto, and that on the said date the said occupiers neglected to observe a certain provision of the said regulations, in that suitable and convenient accommodation, in which to keep the clothing taken off before starting to work, was not provided in such factory for persons then employed in a certain weaving-room therein, in which artificial humidity of air was then being produced in aid of manufacture, contrary to the requirements of the said regulations and Act; the said parties respectively being then present, the charge was duly heard before us, and upon such hearing we ordered that the complaint be dismissed on the merits.

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And whereas the said Sydney Eraut, hath, pursuant to the provisions of the before-mentioned statute, given us notice and required us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said complaint, in order that he might take the opinion of the said Court thereon.

Now, we, the said Justices, pursuant to the said notice and the provisions of the said Statute, do hereby state and sign such case as aforesaid as follows:—

This prosecution was brought under number eleven of the "Regulations, dated February 26th, 1906, made by the Secretary of State in respect of the processes of spinning and weaving flax and tow, and the processes incidental thereto," in pursuance of section 79 of the Factory and Workshop Act, 1901, which said regulation is as follows:—"There shall be provided for all persons employed in any room in which wet spinning is carried on, or in which artificial humidity of air is produced in aid of manufacture, suitable and convenient accommodation in which to keep the clothing taken off before starting to work; and in the case of a building erected after 30th June, 1905, in which the difference between the readings of the wet- and dry-bulb thermometers is

K. B. Div. at any time less than four degrees, such accommodation
 1910. shall be provided in cloak-rooms ventilated and kept at a suitable
ERAUT temperature and situated in or near the work-rooms in question.”
v.

Ross. The following is a statement of the evidence given at the hearing of the said complaint:—

William John M'Caghey, sworn, saith:—"I am one of His Majesty's Inspectors of Factories. I visited the defendants' factory on Thursday, the 28th October, 1909. Humidity was being produced at the time. In the winding department there were seventy-five workers, and in it fifty hooks were provided for the workers' clothing; the hooks were fixed on a wall sheeted with wood. In the weaving department 200 workers had similar accommodation provided for their clothing."

To Mr. J. M. Whitaker, barrister-at-law (who appeared for the defendants):—"There might have been sixteen more hooks in the winding department, but the fifty were all that were shown me by the manager. In the other room there were more hooks than workers. I do not know the width between the wall and the looms, but if the firm stated it was 32 inches, it was probably right; my business on that day was simply to report on the accommodation provided. Presses were used in some other factories. To obviate the difficulty in this case, presses, heated and ventilated, could be provided, but it would not be possible to have these in the passages. There were alternatives, however, such as an ante-room or a cloak-room."

To Mr. Townsend, R.M.:—"Witness would not say that the clothes were dangerously damp."

For the defence, Hugh R. Ross, a director of the firm, was tendered as a witness.

Mr. Erant asked the Court for a ruling as to whether he was a competent witness. Mr. Townsend decided that, as he was a member of the defendant Company, he could not be examined.

Samuel Faulkner, sworn, saith:—"I am in the employment of the defendants, and have been manager of the particular room for seventeen years. I look at the photo produced; it correctly represents the pegs. I never had a complaint from any of the workers as to the condition of the clothing. I assisted in the preparation of the sketch produced; we could not possibly put

presses there; the space is about 32 inches at the widest part; and as we have to bring beams or large spools 12 inches in diameter along the passage, it would be impossible to have a press there and work the looms. In order to move the looms further in, we would have to take away a row of them; presses with sliding doors could not be put against the wall and leave sufficient space. The Inspectors called from time to time. The first suggestion from Mr. M'Caghey was that we should go up to Rosebank Factory and see what arrangements they had. By the present arrangement of putting the clothes on hooks against the wall they are a good deal drier in the evening than when they are hung up. Taking the average, there is more humidity outside than there is inside the factory."

Cross-examined by Mr. Eraut—"We could not put up a press nine inches deep, because we could not get the beams down. I have hung up my own clothes just to get them dried when they were damp. When the workers come in on the winter mornings, the temperature is forty-five degrees. If too hot, the place is put so as to make it comfortable for them; the reason we put humidity in is to replace the natural humidity that is taken out of the yarns. The workers' clothes are coming out of a wet atmosphere into a drier one; the average we maintain between the thermometers is between three and a half and four; the average of the bulb is sixty. I do not say three and a half is very humid. Humidification goes on all day. It is suitable and convenient to keep the clothes on a peg. I do not know any factory where presses—heated and ventilated—have been provided. I know the factory at Whitehouse by repute. I have never seen a factory where a room is provided. Three of the walls of the weaving shed are inside walls, and the fourth, which is an outside wall, is sheeted."

Robert J. M'Keown, sworn, saith—"I am the managing director of the Milford Weaving Company, Limited, and have been over twenty years in the business. I have heard the condition of affairs described here to-day, and look at the photo produced. The conditions are similar to our own; the sheeting on the outside walls makes it better; hooks are the most suitable and best. So far as a regular cloakroom is concerned, if the workers would use one, it

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K. B. Div. would be better, but the pegs are better than boxes or presses; the
1910. clothes are sometimes hung up wet and taken down dry. In no
ERAUT case do I know of the clothes going out damper than when they
v. came in. When I was a younger man, I examined the clothes, but
Ross. have not done it lately. We average four degrees. If the
humidity were brought down to a difference of two degrees,
lacquered machines would get rusted, and it would be impossible
to continue the process of weaving. It would be absolutely
impossible to make the clothes of the workers damp."

Cross-examined by Mr. Eraut—"As a rule our hydrometers read an average difference of three degrees to four degrees. In July I expect it would be the same. We do quite the same steaming now as in the summer months. We have not tried any sort of presses or boxes; we would be quite willing to do anything that would be an improvement on the present system. I have got the opinion of men who have boxes or presses; they all speak against them and agree with me that they would not be an improvement on the present system; workers do not like them; they harbour vermin; clothes would not dry as well in a box even with proper ventilation or a steam-pipe, as outside; I am not aware of any better arrangement. I regard clothes on pegs as a suitable and convenient accommodation."

To the Court—"It would be quite possible to have a curtain. I do not believe a curtain would interfere with the clothes."

George Gardner, sworn, saith—"I am a director of Loop Bridge Mill, and I have heard the evidence of Mr. M'Keown, and agree with it in every respect. We have the same conditions as Mr. Ross. In my opinion it is the most suitable and convenient."

Cross-examined by Mr. Eraut—"We have not a cloak-room at our factory; we have no cloak-room upstairs, and never had one; we have a dining-room upstairs; the workers do not hang clothes there. I never heard of a dining-room being used as a cloak-room. I never heard of the workers hanging their clothes there; they do not use it as a cloak-room; when the Inspector came to our works, I did not show it to him as a cloak-room, nor as going to be one. We are humidified, average four degrees, occasionally three; we like to keep as near four as possible."

Robert T. Scott, sworn, saith—"I am managing director of Rosebank Spinning Company, Limited, and have been all my life in the business. I agree with the last two witnesses as to the pegs; in my opinion they are the most suitable and convenient in any of the old factories; we have the same in Rosebank; the clothes are actually drier in the evening than in the morning. I have examined them since this case was first mentioned: they are generally quite dry, and in some cases warm; I would not approve of boxes."

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Cross-examined by Mr. Eraut—"I did not appear as an objector at the time the regulations were being drawn up, because the matter was in the hands of the council. We built a factory a short time ago, and could not get a single worker to go into the cloakroom."

Thomas Orr, sworn, saith—"I am the manager of Bessbrook Spinning Company, Limited, and have twenty-three years' experience. I was fifteen years in York Street Mill; I agree with the evidence of the previous witnesses. Having regard to the construction of the buildings, I consider the present arrangement the most suitable and convenient. I have known workers in mills, where places were provided, refuse to hang up their clothes therein; they prefer to hang them up where they will get dry."

Cross-examined by Mr. Eraut—"I would not agree with boxes."

It was admitted that this factory was erected before the 30th June, 1905, and that the latter part of the regulation which requires that the accommodation "shall be provided in cloakrooms ventilated and kept at a suitable temperature, and situated in or near the workrooms in question," did not apply; but Mr. Eraut contended that the words, "there shall be provided . . . suitable and convenient accommodation in which to keep the clothing taken off before starting work," implied physical separation from the room so as to keep the clothing free from the influence of the humidification.

For the defence Mr. Whitaker contended that on the evidence the humidity in these rooms was less than in the atmosphere outside; that pegs or hooks around defendants' rooms were both suitable and convenient accommodation, and the clothes on pegs or hooks became drier; that presses or boxes could not be

K. B. Div. provided without removing looms; that boxes or presses were not
 1910. suitable or convenient accommodation, because they harbour
ERAUT vermin or infection; that the clothes put in damp in the morning
v. remained damp, and could be taken out damp in the evening; and
Ross. that steam-pipes, as suggested by the Inspector, would raise the
 temperature above the statutory degree of heat to which manufac-
 turers are restricted by section 90 of the Factory and Workshop
 Act, 1901.

And whereas, upon said hearing, we found as a fact that
 suitable and convenient accommodation, where they could keep
 the clothing taken off before starting work, had been provided in
 the factory as required by the regulation, we accordingly dismissed
 the case on the merits.

And hereupon the judgment of the Court is required as to
 whether we, the said Justices, were correct in point of law in our
 determination as aforesaid, or as to what should be done in the
 premises.

Given under our hand this 18th day of February, one
 thousand nine hundred and ten.

N. L. TOWNSEND, R.M.

JAMES MILLAR, J.P.

John Linehan (with whom was *The Solicitor-General* (*C. A. O'Connor, K.C.*)), for the prosecution:—

The regulation is for the protection of the workers, and was
 intended to prevent their clothing, not used while actually engaged
 in work, from being in contact with the humidity of the room;
 hooks or pegs in the open workroom cannot possibly do this; they
 are therefore not suitable and convenient accommodation; more-
 over, it cannot, in any event, be described as accommodation “in
 which” to keep the clothing. The accommodation may be in the
 workroom, but it must be of such a character that the words “in
 which” will aptly apply to it; the magistrates were, therefore,
 wrong in point of law in holding the accommodation in this case
 to be suitable and convenient within the meaning of the regu-
 lation.

S. L. Brown, K.C., and *J. Martin Whitaker*, for the defendant,
 were not called on.

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GIBSON, J. :—

The magistrates have found the question of fact in favour of defendants; and, unless they have misdirected themselves in point of law, we cannot interfere with their finding. I do not think the magistrates are shown to have erred in law. It cannot be said as a matter of law that there was any obligation on the defendants to have a separate cloak-room outside the work-room, with an apparatus for drying clothes. What is to be a suitable arrangement is entirely a question of fact, to be decided by the magistrates, having regard amongst other matters to the humidity of the mill, the nature of the work, and the most convenient way of keeping the clothes, assuming (what was not disputed) that clothes may be lawfully kept in the work-room atmosphere itself, and that it is not necessary to keep them in a separate apartment. I understand the Inspector himself, a very excellent and efficient officer, thought that, though there would not be an obligation on the defendants to have a separate cloak-room provided, still if the clothes were left in the work-room, there ought to be a press or wardrobe for them supplied with hot pipes. But that is a question upon which different minds might come to different conclusions. Mr. Whitaker, in his argument (a short statement of which is contained in the case before us), pointed out that presses such as suggested might not, in the opinion of an experienced person, be either suitable or convenient, as they might harbour infection, and clothes put in damp in the morning would come out from the press damp in the evening. But these and such questions as "what is the degree of humidity?" and "what is the best means to adopt so as to provide suitable and sufficient accommodation?" are all questions of fact; if there is evidence, as there was, to support the magistrates' finding, we cannot disturb it, unless they have decided erroneously in law.

There is a sharp distinction drawn in the regulation itself between factories built before June, 1905, and those built after that year; I suppose the authorities were not anxious to put factories already in existence to undue expense. I assume that these regulations are capable of revision; now that they have

K. B. Div. 1910. been discussed before us, and their alleged insufficiency pointed out, the attention of the responsible authority having been drawn to the matter, any necessary modifications can be made.

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Gibson, J.

We sympathize with much of the argument addressed to us by Mr. Linehan, but we are bound to construe this regulation as it stands. The magistrates have found as a fact that suitable accommodation was provided in the factory as required by the regulation. On the present frame of this regulation, I have come to the conclusion that upon the facts found by the magistrates, who were the supreme judges, there is no error of law shown that would enable us to vary their decision or send it back to them for further investigation. It would be out of the question upon the materials before us to direct a conviction.

KENNY, J.:—

I concur.

Solicitor for the prosecutor: *Malachy Kelly*.

Solicitors for the defendants: *M'Il Dowie & Sons*.

J. M.

THE KING (ROYCROFT) *v.* THE JUSTICES OF THE PETTY SESSIONS DISTRICTS OF SCHULL, BALLYDEHOB, AND GOLEEN, AND SAMUEL WHITLEY (1).

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Jan. 20.

Feb. 24.

Appeal.

April 27.

Clerk of Petty Sessions—Election of—Justices of district—Office held during pleasure—Office de facto full—Mandamus—21 & 22 Vict. c. 100, s. 7.

At an election held for the appointment of a clerk for certain Petty Sessions districts, an office held during pleasure, out of thirteen Justices present seven voted for W. and six for R. Thereupon W. was declared elected. His election was approved by the Lord Lieutenant, and he entered on the duties of the office. One of the Justices who voted for W. was not a Justice of any of the Petty Sessions districts in question within the meaning of 21 & 22 Vict. c. 100, s. 7. R. having applied for a writ of mandamus requiring the Justices of the districts to elect a clerk of Petty Sessions.

Held, by the Court of Appeal, affirming the decision of the King's Bench Division, that the writ should issue.

Reg. (M'Devitt) v. Strabane Urban District Council (35 I. L. T. R. 12) applied and followed.

MANDAMUS.

The prosecutor was a candidate for the vacant office of Clerk of Petty Sessions for the Petty Sessions districts of Schull, Ballydehob, and Goleen, in the County of Cork, which districts had been ordered, by an order made by the Lord Lieutenant under 21 & 22 Vict. c. 100, s. 6, to be served by the same person as clerk. Three successive elections for the office had been held, viz., upon the 4th February, 1909, the 27th May, 1909, and the 14th October, 1909, the candidates at each election being the prosecutor and Mr. Samuel Whitley. At the first election each of the candidates obtained an equal number of votes. At the second election the prosecutor was declared elected by a majority

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. of one vote, but the Lord Lieutenant refused to sanction the election, on the ground that one of the parties who voted for the prosecutor was not a Justice of any of the districts; and a third election was ordered. At this third election, in respect of which the present proceedings were brought, fifteen Justices attended. Twelve of these, including Mr. Purdon, R.M., who acted as Chairman at the election, were admittedly Justices of the districts, or one of the districts, in question. The other three Justices were Messrs. Samuel Nugent Townshend, William M'Donald, and Florence Crowley. A poll was taken. The chairman refused to accept the votes of Messrs. M'Donald and Crowley, who wished to vote for the prosecutor, on the ground that they were not Justices of any of the districts. Of the remaining thirteen Justices, seven, including Mr. Townshend, voted for Mr. Whitley, and six for the prosecutor; and the chairman declared Mr. Whitley elected. His election was subsequently approved of by the Lord Lieutenant; and such approval was on the 5th November, 1909, duly notified to the Justices. The books were then given over to Mr. Whitley, and he was directed to take up the duties of Clerk of Petty Sessions for the districts of Schull, Ballydehob, and Goleen, and had since been in the office and discharging the duties of Clerk of Petty Sessions of these districts.

The present application was, on notice by the prosecutor, for an order that a writ of mandamus should issue against the Justices of the Petty Sessions districts of Schull, Ballydehob, and Goleen, requiring them to elect a Clerk of Petty Sessions for these districts; and also for a writ of *quo warranto* directed to Samuel Whitley, requiring him to show by what authority he claimed to be, and to act as, Clerk of Petty Sessions of the said districts; on the grounds (*inter alia*) that the said Samuel Whitley had not a majority of lawful votes of the Justices of such districts; that Mr. S. N. Townshend was not entitled to take part in the election; and that the prosecutor received at the election a majority of lawful votes.

In an affidavit made by Mr. Purdon, R.M., and filed on behalf of Mr. Whitley, who opposed the application, it was stated that Mr. M'Donald did not reside, nor had he any property, in any of the said districts, and that he had admitted

that he had never attended any Petty Sessions for any of the districts; that his residence was seventy miles from Schull, in the Quarter Sessions district of Cork, and in the East Riding of the county; and that he claimed to vote on the ground that, being Chairman of the County Council and a magistrate of the county, he was a Justice of every Petty Sessions district in the county. It was further stated that Mr. Crowley resided near Dunmanway, some thirty miles from Schull, in the Petty Sessions district of Dunmanway and the Bandon Quarter Sessions district; and had never sat at Petty Sessions in any of the districts for which the election was held, nor had any property in any of them.

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The position of Mr. S. N. Townshend was dealt with in affidavits of the prosecutor, of Mr. Purdon, and of Mr. Townshend himself. The prosecutor stated:—"Samuel Nugent Townshend . . . was appointed to the Commission of the Peace for the County of Cork in the year 1867. From the year 1867 down to the present time he has not resided in either the Schull, Ballydehob, or Goleen Petty Sessions districts. It is true that from about 1867 down to 1870, or a little later, he resided in the Skibbereen Petty Sessions district. During that time he may have attended on a few occasions at the Ballydehob Petty Sessions district. About the year 1870, or a year or two later, the said Samuel Nugent Townshend ceased to reside in this country, and emigrated to California, where he resided for close on twenty years. He then returned to England, and since his return he has not resided or acted in Ireland. The said Samuel Nugent Townshend resides at Southsea in England."

Mr. Purdon in his affidavit stated:—"I am aware that Mr. Samuel Nugent Townshend adjudicated repeatedly at Ballydehob and Schull, and is still a landlord of property in the Ballydehob Petty Sessions district, and a few years ago he adjudicated at Skibbereen Petty Sessions, when I presided. He is the senior magistrate for the district; and, though he resides in England, visits this country occasionally."

Mr. Townshend stated in his affidavit:—"I was appointed a magistrate for the county of Cork in the year 1867. At that time I resided at St. Kames' Island, in the Skibbereen Petty

K. B. Div. Sessions district. Ballydehob is about two miles distant by water. I attended Ballydehob Petty Sessions regularly, and
 1910.
 THE KING (ROYCROFT) Schull occasionally, the greater portion of my property being
 v. in the Ballydehob Petty Sessions district, and being nearer to
 JUSTICES OF me, Schull being four and a half miles away. I generally went
 SCHULL, &C., to both places by steam-launch. The statement made in the
 PETTY Sessions said affidavit " (of the prosecutor), "that I went to California
 DISTRICTS, said affidavit " (of the prosecutor), "that I went to California
 AND in 1870, or a year or two later, is not a fact. . . I never resided
 WHITLEY. in California, nor ever spent more than a few months in that State.
 I travelled in Mexico, Canada, and the United States, from 1876
 to 1884, but I returned almost every year, notably in the year
 1879, some of which I spent at St. Kames' Island. I was resident
 in England in 1883 and 1884, and have continuously resided
 there since 1886, but have returned to Ireland occasionally, and
 last adjudicated on October 4th, 1905, at Skibbereen, when on a
 visit to Captain Morgan of Burnabeen, my brother-in-law."

A. M. Sullivan, K.C., and Swayne, for the prosecutor.

Serjeant Moriarty, K.C., and M'Sweeney, for Samuel Whitley.

Feb. 24.

WRIGHT, J. :—

At the request of my Lord I give judgment first.

The application here is on behalf of Mr. Edward J. Roycroft, as prosecutor, for an order that a writ of mandamus be issued against the Justices of the Peace of the Petty Sessions district of Schull, Ballydehob, and Goleen, requiring them to elect a clerk of Petty Sessions for these districts ; and also for a writ of *quowarranto* directed to Samuel Whitley, requiring him to show by what authority he claims to be, and to act as, clerk of Petty Sessions for these districts.

The application is based on certain irregularities, or illegities alleged to have been committed, at an election of a clerk of Petty Sessions for the above districts on the 14th October last. The course of proceedings in the matter is very remarkable. It appears that a vacancy having occurred in the office of Petty Sessions clerk, three successive elections, or attempted elections, were held to fill the vacancy. The first election was in February,

1909. There were two candidates, the prosecutor and the above-mentioned Mr. Samuel Whitley; and as each obtained an equal number of votes, this election proved abortive. A second election was held in May, at which the prosecutor was declared elected, but the Lord Lieutenant refused to sanction his election, and accordingly a third election was held on the 14th October last. At that election fifteen Justices were present. The votes of two were disallowed by the Chairman, Mr. Purdon, R.M.; of the remaining thirteen, seven voted for Mr. Whitley, and six for the prosecutor; and the Chairman therefore declared Mr. Whitley elected. The legality of the proceedings at that election has been challenged by the prosecutor, who says that although Mr. Whitley was declared elected, the election was void, and a new election should be held.

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Before going further into the facts it will be convenient to deal with the argument of Serjeant Moriarty and Mr. M'Sweeney on behalf of Mr. Whitley. They argued the case on the high legal ground that whether the office has been filled rightfully and lawfully or not, it is at all events full in fact, there is a plenarty, and therefore mandamus does not lie.

A number of cases were cited. I shall refer to them very shortly. Three cases are from the same volume of reports. The first of these is *The King v. The Mayor, &c., of Winchester* (1). There a rule *nisi* had been obtained by the prosecutors, who claimed to have been duly elected as town councillors, for a mandamus commanding the mayor to allow them to vote and act; and a rule *nisi* had also been obtained by the same prosecutors for a *quo warranto* against certain persons who had been declared elected. The Court discharged the rule for a mandamus, on the ground that the offices were *de facto* full, but made absolute the rule for the *quo warranto*. The second case is *The Queen v. Councillors of Derby* (2). I read the marginal note:—"At the first election of councillors for a ward, under statute 5 & 6 Wm. 4, c. 76, A and B were elected by the smallest numbers. At the election of aldermen immediately following, two of the councillors elected by higher numbers were chosen aldermen. C and D were chosen

(1) 7 A. & E. 215.

(2) *Ibid.*, 419.

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councillors in their places, each by fewer votes than had been given for A or B. At the time for electing councillors in the following year, A and B remained in office, and C was elected councillor in another ward, and was admitted to the office. The candidate for that office, who had had the next largest number of votes, disputed the election, on the ground that C was still a councillor of the first ward, inasmuch as he had been chosen to fill an extraordinary vacancy; that this fact was notorious to the burgesses, and, consequently, that the votes given for C in the second ward were thrown away. A mandamus was therefore moved for to swear in the opposing candidate. Held, that, assuming the objections to be well founded (on which the Court did not decide), a mandamus could not go, the office being full, and being one for which a *quo warranto* might be brought." The third case is that of *The Queen v. Phippen* (1). Here also the Court refused to issue a mandamus to the mayor to proceed to a new election, holding that the vacancy must first be ascertained by judgment on a *quo warranto* information.

Those cases were decided in the years 1837 and 1838. I now come to a later case, decided in the year 1855, and it is on this case that Serjeant Moriarty places his principal reliance, the case of *Frost v. Mayor of Chester* (2). It was argued on a demurrer to a return to a writ of mandamus. Counsel for the prosecutor contended that the alleged election, being made by persons who had no power to elect, was void; that there was therefore a vacancy, and the mandamus should go. Counsel on the other side contended that there having been an election *de facto* and not merely colourable, there was a plenarity, even though the election might be void on legal grounds. Lord Campbell, C.J., in giving judgment says:—"The return shows that no mandamus ought to go. It shows that an election was 'duly held,' at a time when at any rate there was a vacancy. And it alleges that John Smith, being duly qualified and duly elected, accepted the office of councillor and made and subscribed the declaration, and does still hold and continue in that office, wherefore the office is full of him. We have thus an election, an acceptance, an admission, and an alleged

plenarty; there is therefore a plenarty *de facto*, unless the election on the 30th November was colourable; and it is a clear point in municipal law, that where a man is *bona fide* in office, his title is not to be tried by mandamus, but by *quo warranto*. There can be no doubt that here *quo warranto* would lie against Smith. I do not know that there is any case exactly like this; but we may safely say that *quo warranto* is the proper proceeding, except where the disputed election is merely colourable, so as to be no election at all." Coleridge, J., in the course of his judgment says:—"I always thought it an inflexible rule in corporation law that, where a man elected has accepted office and is in, unless the election be colourable and so merely void, the proceeding must be by *quo warranto*, not by mandamus. The question then, is, what is colourable? I always thought that, where an authority existed, and there was a *bona fide* intention to execute it, the proceeding was not colourable though there might be a mistake in law." Wightman, J., says:—"For the present question, we may assume that the office is not full *de jure*, but only *de facto*; and, for the purpose of the present argument, we may assume that the election has been holden in a way not warranted by law, and is therefore bad, and such as could not be supported on *quo warranto*. But the office is not the less full *de facto*; the party elected has been admitted. I think, therefore, that a plenarty is shown which is decisive in favour of Mr. Welsby's clients, and that the question can be tried only by *quo warranto*."

It is to be observed that in each of the above cases the office in dispute was a municipal one, and the alternative remedy of *quo warranto* was apparently open. The cases appear to establish the practice in England, that in case of a municipal office *quo warranto* is the proper remedy where the office is full, and the Court will therefore refuse mandamus. Does the reasoning in these cases apply to the present case, where the office is one which is held merely during the joint pleasure of the Lord Lieutenant and the Justices, and with respect to which, as is, I think, clearly shown by the case of *The Queen v. Bayley* (1) and the judgment of Palles, C.B., in *Rex (Whitley) v. Justices of County Cork* (2),

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(1) [1898] 2 I. R. 335.

(2) 43 I. L. T. R. 133.

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I might have had some difficulty, having regard to the English cases, in holding that there was a remedy here by mandamus, were it not for the decision of the King's Bench Division in this country in the case of *Reg. (M'Devitt) v. Strabane Urban District Council* (1). That was an application to make absolute a conditional order for a mandamus to compel the Urban District Council of Strabane to proceed to the election and appointment of a clerk to the Council. There had been an election for the office, and each of three candidates obtained three votes. The chairman gave a casting vote for one of these candidates (Thomas Feely), and declared him duly elected. M'Devitt, one of the other two candidates, then applied for a mandamus as above mentioned. The arguments of counsel on both sides are interesting, and throw a good deal of light on the judgment of the Lord Chief Baron:—"Campbell, Q.C., and Horner, for the prosecutor.—The election is void. The chairman had no power to give a casting vote, for it did not constitute a majority of the members present, under section 38 of the Commissioners Clauses Act, 1847, 10 & 11 Vict. c. 16, incorporated in the Towns Improvement (Ireland) Act, 1854, the latter being one of the applied enactments under Schedule 5 of the Local Government (Ireland) Act, 1898. Mandamus is the only remedy open, as it is expressly decided that the writ of *quo warranto* does not lie in such a case. *Wylie, K.C., Henry, K.C., and A. Todd*, for Thomas Feely.—Mandamus does not lie here, because the office is *de facto* full. The office is one from which the holder is not removable at will and pleasure; there must be some good cause or valid reason for his removal. Under the Local Government Act, a Town Clerk is an important public officer with important public duties to perform—*e.g.*, those of returning officer; and looking upon him as such, the writ of *quo warranto* is applicable." The argument therefore against granting the writ of mandamus was that *quo warranto* lay, and that, the office being *de facto* full, mandamus did not lie. These arguments are dealt with by Palles, C.B., in delivering the

judgment of the Court, which consisted of himself and Andrews, Johnson, and Gibson, JJ. He says:—"The application for a mandamus in this case rests upon two grounds—firstly, that the election already held is void; and secondly, that the writ of *quo warranto* does not lie in such a case. It was not contended that this was a valid election." Counsel here rely on this last sentence as distinguishing *M'Devitt's Case* (1) from the present—in that case the votes were even, here they were not. But the Lord Chief Baron goes on to say:—"On section 38 of the Commissioners Clauses Act, that point is not arguable. 'At all meetings of the Commissioners the questions there considered shall be decided by the votes of the majority present, and if there be an equal division of votes upon any question, the chairman or Commissioner acting as chairman at such meeting shall, in addition to his own vote as a Commissioner, have a second or casting vote.' Here each of the three candidates had the votes of three Commissioners, and the question before them was whether one particular man should be elected clerk. On that question there were three in the affirmative, and six in the negative, and therefore there was not an equality of votes, and the chairman was not entitled to give a casting vote. On the second question, as to whether mandamus is the proper remedy or whether *quo warranto* lies in such a case, it is well settled law that if the office is one held at the will and pleasure of the party or body having the power of appointment thereto, the writ *quo warranto* does not lie. We must therefore examine the power of appointment in the present instance. It is given by section 65 of the Commissioners Clauses Act, 1847; and it is to be observed that this section deals with the appointment of all officers by the Commissioners [reads s. 65]. The appointment and dismissal are clearly at the will and pleasure of the Commissioners, and I am not aware of any authority that would authorize us to read in the words 'for due cause.' " And after dealing with the cases of *R. v. Neligan* (2), *R. v. Bayley* (3), and *R. (Jacob) v. Blaney* (4), the Lord Chief Baron proceeds:—"These cases decide that where an office is held at the will and

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(1) 35 I. L. T. R. 12. (2) 14 L. R. Ir. 149. (3) [1898] 2 I. R. 335.

(4) [1901] 2 I. R. 93.

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Now, as I have said, stress was laid on one sentence in that judgment, that it was not contended that the election there was valid; and it is argued before us that in *McDevitt's Case* (1) the contention that the election was valid was given up. I do not take that view of the case, having regard to the argument on behalf of Feely which I have already read—"Mandamus does not lie here, because the office is *de facto* full." The report of the case is obviously very condensed, and my Lord has communicated with the Lord Chief Baron, putting the following question—"Would it have made any difference in your judgment in *Reg. (McDevitt) v. Strabane Urban District Council* (1), if instead of the counsel having admitted that the election was invalid, the Court itself came to the conclusion that it was invalid?" The answer of the Lord Chief Baron is as follows—"It certainly would not have made any difference. Had the facts as they existed, as distinguished from those admitted, not been such as to have rendered the election invalid in law, the Court would not have had jurisdiction to issue a *quo warranto*, and I should not have considered that I could issue a prerogative writ when the jurisdiction to do so depended merely on consent. In the case above referred to I was of opinion that the facts *as proved by the affidavits* showed that the election was invalid in law, and the object of my statement that this was admitted was merely to prevent the necessity of arguing that which was too plain to be controverted." So that the judgment of the Lord Chief Baron was, not that the argument was given up, but that when the facts were examined, it was perfectly plain to the Court that the election was in fact void. Taking that judgment, with the amplification of it which I have read, I cannot help holding that it is an authority showing that we must grant the writ of mandamus if we find in fact that the election was void; and that we are not bound by the English decisions I have referred to, but can go behind the apparent election and see was it valid.

I proceed therefore to refer very shortly to the mode in which the election was conducted. By sect. 6 of 21 & 22 Vict. c. 100, the Lord Lieutenant may order that two or more Petty Sessions districts may be served by the same clerk, and in the present case the three Petty Sessions districts of Schull, Ballydehob, and Goleen were served by the same clerk. Section 7 of the Act provides for the mode of holding the election. I read the portion of the section applicable to the present case—"As often as a vacancy shall arise in the office of Petty Sessions clerk serving two or more districts, the Justices of such districts shall appoint some proper person to fill such office; provided always, that notice shall be given by the clerk of the peace for the county or division in which such districts, or the greater part thereof, are situate, of the time and place at which the Justices of such districts are to meet to consider such matter; and such notice shall be published in some newspaper circulated in such county or division, and shall be served upon each Justice seven days at the least previous to such meeting, either by delivering the same personally to such Justice, or by leaving the same at or transmitting it by post to his usual place of abode." That is to say, the election is to be by the Justices of the districts which the Petty Sessions clerk is to serve, and notice convening such Justices is to be given by the clerk of the peace in the prescribed manner.

In the present case, as a result of the two abortive elections I have referred to, it appears that a list of the Justices entitled to vote was prepared by the registrar of Petty Sessions, and sent down to the clerk of the peace, and that the several Justices whose names appeared on that list were given notice of the election to be held on the 14th October. Of course the fact that certain names appeared on that list would not make the persons Justices of the districts, nor would the fact that certain names were omitted of itself disqualify such persons. It is for us to decide whether the Justices who voted were Justices of the districts or not. Upon that question we have been referred to a passage from Molloy's Justice of the Peace, p. 494. Mr. Sullivan calls it a "pious opinion." It has not, no doubt, the sanction or force of an Act of Parliament, but it is a statement appearing in a text-book of great authority. The text-writer says—"Those magis-

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I come now to analyze the proceedings at the election held last October. All sorts of allegations of bribery and corruption have been made, and, in my opinion, made most improperly and without a particle of evidence to support them, and I put these charges out of consideration. I have gone very carefully through the votes, and I think the question comes down to the validity of the vote of one man, and one man only. The prosecutor in his affidavit objects to four Justices as not being qualified to vote, viz., Mr. Samuel Nugent Townshend, Mr. Richard Hull, Mr. Richard Townshend, and Mr. Richard Carey. But of these it appears that Messrs. Hull, Richard Townshend, and Carey did not vote or attend the meeting at all. He also takes exception to the refusal of the chairman to allow the votes of Mr. M'Donald and Mr. Crowley, but I think that the chairman was quite right in this. Mr. M'Donald resided seventy miles away; had never attended Petty Sessions in any of the districts; and his sole claim to vote was, that being Chairman of the County Council he was a Justice of every Petty Sessions district in the county. Mr. Crowley lived thirty miles away; he was appointed for the Petty Sessions districts of Dunmanway and Ballineen; and had never sat at Petty Sessions for any of the districts for which the election was being held. The votes of these

two gentlemen were therefore rightly disallowed. This left thirteen Justices. Of these six voted for the prosecutor, and seven for Mr. Whitley. Of these seven the only vote challenged is that of Mr. S. N. Townshend, and the question is, was he a Justice of these districts or not? I shall very shortly consider his position. It is dealt with in three affidavits: that of the prosecutor, that of Mr. Purdon, the Resident Magistrate, and that of Mr. Townshend himself. [His Lordship read the portion of the prosecutor's affidavit, set out *ante*, p. 603.]

Certainly if these statements were uncontradicted, it would be hard to say that Mr. Townshend was at the present time a Justice of these districts. Some of the statements have been contradicted, and some are uncontradicted. I turn to the affidavit of Mr. Purdon, and here is how he deals with the matter. [His Lordship read the portion of Mr. Purdon's affidavit set out *ante*, p. 603.] I come now to the affidavit of Mr. Townshend himself, and I accept implicitly every word he says:—[His Lordship read the portion of Mr. Townshend's affidavit set out *ante*, pp. 603, 604]. The result is, that passing over any inaccuracies as to the movements of this gentleman at the earlier dates, whether he was in California or elsewhere, we have these facts: that he lives at Southsea, and has lived there since the year 1886; that he occasionally comes over to Ireland to see his property; that the last time he adjudicated at Petty Sessions was in the year 1905, and that then he sat not for these districts but for the district of Skibbereen. In my opinion, he was not a Justice of these districts, and his vote was improperly allowed.

I am of opinion, therefore, that Mr. Whitley had not a majority of votes; that the election was void; and that a mandamus ought to issue to compel the Justices to hold a new election.

MADDEN, J. :—

I shall state shortly the reasons which have led me to concur in the judgment of the Court that the writ of mandamus should issue.

During the argument, I was impressed by two considerations, either of which seemed inconsistent with granting the writ of mandamus in the present case: first, it is clear that the office is full. An election was held in fact; the candidate who obtained

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K. B. Div. the majority of votes is actually in the office; and it has been
 1910. laid down by high authority, in language apparently unqualified,
 THE KING that in such a state of facts the remedy by writ of *quo warranto* is
 (ROYCROFT) inapplicable. Secondly, the office in question is held at will, and it
 v. appeared to be equally well settled that a writ of mandamus ought
 JUSTICES OF not to be granted in respect of an office so held. No doubt the
 SCHUL, & C., result would be that, in a case like the present, the prosecutor
 PETTY would be without a remedy. But is that a startling result in
 SESSIONS the case of an office held at will? This must be the result in the
 DISTRICTS, case of an unqualified person being elected to such an office.
 AND Where an election to an office held at will has been duly held,
 WHITLEY. but the person elected is without the necessary qualification, the
 Madden, J. remedy by *quo warranto* would be inapplicable by reason of the
 tenure of the office. If the election were duly held by qualified
 electors, and the successful candidate admitted to the office, the
 remedy by mandamus would seem to be equally inappropriate,
 with the result that there would be in such a case no remedy,
 except the effective one, if it were had recourse to, of dismissing
 the unqualified holder of the office.

I am, however, relieved from considering this question in
 the light of the earlier authorities by the decision of this Court
 in the case of *Reg. (M'Devitt) v. Strabane Urban District
 Council* (1). I have examined that case with care. At first
 it appeared to me that it could be distinguished from the
 present in regard to the plenarity of the office. In *M'Devitt's
 Case* (1) there had not been a majority of votes for any one
 candidate; while in the present case there was an actual majority.
 The authority, however, of a judicial decision does not depend on
 the facts regarded in themselves, but on the view of the facts
 upon which the decision is based, and, on carefully examining
M'Devitt's Case (1), I am satisfied that the Court dealt with
 it as one in which the office was full in fact, and that the ground
 of decision was that, unless the writ of mandamus were to be
 granted, the prosecutor would be without remedy in a case in which
 there had been an illegality in holding the election. As the office
 in that case was tenable at will, I consider myself bound by that
 authority, and therefore, I concur in the judgment of the Court.

(1) 35 I. L. T. R. 12.

LORD O'BRIEN, L.C.J.:—

As my brother Wright thought it expedient to go fully into all the facts of the case as to the legality of the different votes, I asked him to precede me in delivering judgment. I entirely agree in his judgment and in his criticism on the facts of the case. I shall shortly express my own view.

Whatever doubt may exist as to this case—and I think no doubt does exist—one thing at least is clear, is very clear. It is very clear that the learned Serjeant, Serjeant Moriarty, has the courage of his convictions. After an exhaustive discussion both by Mr. Sullivan and Mr. Swayne, as to the meaning of the words “justices of such district,” in the 7th section of the 21 & 22 Vict. c. 100, I asked the learned Serjeant what was his construction of these words? He told me at once that he was not concerned with them; that his point was that the office was *de facto* full; and he added that one good point was worth forty bad ones. This method of argument is very satisfactory to a Judge. To me it is peculiarly satisfactory—it absolves me from the consideration of other points. Of course if the other points were to be relied upon, the Bench would expect, and should receive, from counsel all the assistance they could afford. I entirely decline to set out on a voyage of discovery which counsel do not undertake. To do so would be abnormal indeed, for counsel could say, this is my one point; find out the rest for yourself. The Serjeant had too keen a sense of propriety—too much respect for himself and his profession—to do anything of the sort. He had evidently considered the case with his usual great care, and took his one point and consistently adhered to it exclusively. The learned Serjeant's argument was very succinct—clearness itself—but was it sound? *Frost's Case* (1) was pressed upon our attention by both the learned Serjeant and Mr. M'Sweeney, *totis viribus*. It is, no doubt, a case of great authority, decided by Judges of very great eminence, but has it any application to the case before us? None, in my opinion. There a mandamus was asked for, and refused because *quo warranto* lay. The Judges decided in so

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(1) 5 E. & B. 531.

K. B. Div. many words that *quo warranto* was the proper appropriate remedy,
 1910. and therefore refused the application for a mandamus. See the
 THE KING judgment of Lord Campbell, C.J., and Mr. Justice Coleridge.
 (ROYCROFT) But Mr. Sullivan and Mr. Swayne, who argued the case so
 v. well, brought to our attention the case of *Reg. (M'Devitt)*
JUSTICES OF v. *Strabane Urban District Council* (1). This was the unanimous
SCHULL, & C., decision of a Court of very high authority, and, in my opinion,
 PETTY v. *Strabane Urban District Council* (1). This was the unanimous
 SESSIONS decision of a Court of very high authority, and, in my opinion,
 DISTRICTS, concludes the case in favour of the applicant here. The
 AND ground of decision in that case was that as *quo warranto* did
 WHITLEY. not apply, mandamus was the appropriate remedy. Here
 Lord O'Brien, *quo warranto* does not apply, because the office is held at will
 L.C.J. and pleasure—it is not a freehold office. *M'Devitt's Case* (1)
 was sought to be distinguished from the present, on the
 ground that it was said to have been admitted that the election
 in that case was void. Having regard to this assertion, I sent
 to the Chief Baron the volume of the *Law Times* which con-
 tained the report of his judgment in *M'Devitt's Case* (1), and
 I addressed to him the question, and he gave the answer to
 which my brother Wright has referred. They will be incorpo-
 rated in the report of this case. In this case Mr. Sullivan and
 Mr. Swayne argued, as I have said, with great force and
 earnestness, that having regard to the words in the 7th section
 of the 21 & 22 Vict. c. 100, the defendant had not a majority of
 legal votes; but Mr. Serjeant Moriarty left these words untouched
 in his argument, though asked by me for his construction of them,
 and, as I have said, rested his contention on the circumstance
 that the office was *de facto* full. I deal with the case on the basis
 upon which it was argued by Mr. Whitley's counsel, that the
 office was *de facto* full. Now it will be seen that this was the great
 point made for the defendant in *M'Devitt's Case* (1). Every case
 on the subject, including *Frost's Case* (2), was cited, and without
 effect. A mandamus was granted. The Lord Chief Baron in
 the concluding sentences of his judgment stated, after referring to
 several cases:—"These cases decide that where an office is held
 at the will and pleasure of a person or body having the power
 of appointment thereto, the writ *quo warranto* does not lie.
 Accordingly the writ of mandamus must go in this case."

In my opinion, the judgment in *M'Devitt's Case* (1), an essentially salutary decision, is decisive of the present controversy. It would indeed be not alone a reproach, but a scandal, to our law that a man who was not legally elected to the office should be permitted to hold it merely because he was in actual physical possession of it. *Ubi jus, ibi remedium*—a maxim of which our law is peculiarly proud—would in that case be wholly disregarded.

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Whitley appealed to the Court of Appeal (2):—

Serjeant Moriarty, K.C. (*M'Sweeny* with him), for the appellant:—

[He proceeded to argue that the election of Whitley was a valid one, when he was stopped by the Court, as the validity of the election had not been argued in the Court below.]

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The writ of mandamus was wrongly granted. The applicant had no *locus standi*; he was, and remains, a defeated candidate. *Quo warranto* admittedly does not lie, and, as the Court will make no order in vain, neither will a mandamus be granted to compel the admission to such an office as this of an applicant who might be forthwith removed at the will of the magistrates and the Lord Lieutenant: *R. (Whitley) v. Justices of Cork* (3). The election of Whitley was not an illusory one, or in any sense colourable, as was that in question in *Reg. (M'Devitt) v. Strabane Urban District Council* (1); and, the office being *de facto* filled by Whitley, it is well settled law that a writ of mandamus will not be granted to compel the holding of a new election.

The principle is thus stated in the Laws of England (Lord Halsbury), vol. x., p. 81, par. 165: "A mandamus to restore, admit, or elect to an office will not be granted unless the office is vacant. If the office is in fact full, proceedings must be taken by way of *quo warranto* or election petition to oust the party in possession.

(1) 35 I. L. T. R. 12.

(2) In the Court of Appeal before THE MASTER OF THE ROLLS, PALLES, C.B., and HOLMES, L.J.

(3) 43 I. L. T. R. 133.

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A mandamus will go only on the supposition that there is nobody holding the office in question." In *R. v. Mayor of Colchester* (1), a mandamus to admit to the office of a recorder was refused, because there was a recorder *de facto*. In *R. v. Justices of Herefordshire* (2), where a mandamus to elect to the office of county treasurer was sought, Abbott, C.J., said—"We cannot grant a mandamus to fill up such an office as this, unless it is actually void—this Court does not grant a mandamus to appoint to an office which is already full." There are many cases to the like effect: *Reg. v. Grimshaw* (3); *Frost v. Mayor of Chester* (4); *R. v. The Mayor, &c., of Winchester* (5); *Reg. v. Councillors of Derby* (6); *Reg. v. Phippen* (7). [He also referred to *Reg. (Riall) v. Bayly* (8); *Ex parte Sandys* (9); and *R. v. Griffiths* (10).]

A. M. Sullivan, R.C., and Swayne, for the respondent:—

Section 6 of 21 & 22 Vict. c. 100 imposes a statutory obligation on the magistrates to hold a valid election to the office, which obligation remains unperformed, as admittedly the election held was invalid, and the prosecutor is entitled to ask for a writ of mandamus to compel the performance of that obligation, unless there is another remedy open. In *R. v. Minister and Churchwardens of Stoke Damerel* (11) Patteson, J., said, in reference to the election of a sexton—"I am confident that, if the question cannot be tried by a *quo warranto*, the course is to grant a mandamus for a new election, where the Court is satisfied that the first election is void. Where there is any other mode of trying the right, a mandamus ought not to go." *Quo warranto* admittedly does not lie in respect of such an office as that of Petty Sessions clerk; and if a mandamus were now to be refused, the King would be left without a remedy in his own Court. There is no such general rule that mandamus will not go where the office is *de facto* full;

(1) 2 Term. Rep. 259.

(2) 1 Chitty, 700.

(3) 10 Q. B. 747.

(4) 5 E. & B. 531.

(5) 7 A. & E. 215.

(6) 7 A. & E. 419.

(7) 7 A. & E. 966.

(8) [1898] 2 L. R. 335.

(9) 4 B. & Ad. 863.

(10) 5 B. & Ald. 731.

(11) 5 A. & E. 584.

that is only so where the office is such that a writ *quo warranto* would lie in respect of it. See judgment of Channell, J., in *R. v. Beer* (1). In each of the cases cited by the other side, except *R. v. Justices of Herefordshire* (2), the remedy by *quo warranto* was applicable, and the latter case is distinguishable, as there, although the Court refused both a *quo warranto* and a mandamus, it is clear that each of the Judges who decided the case was of opinion that the election in question was valid. [They also referred to *Reg. v. Mayor, &c., of Bangor* (3), and *R. v. Corporation of Bedford* (4).]

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M'Sweeny replied :—

THE MASTER OF THE ROLLS :—

In my judgment there has been some misapprehension as to the nature and effect of the order of the King's Bench Division. The order directs the magistrates to elect a clerk of Petty Sessions, in the manner required by law. This order, as Mr. Sullivan has pointed out, is one directing the Justices to fulfil a statutory obligation in the fulfilment of which the public is interested. The order of the King's Bench Division proceeds on the basis that the statutory duty of appointing some person to the office of clerk of Petty Sessions has not been fulfilled. Serjeant Moriarty and Mr. M'Sweeny urged upon the Court that it was settled by a long line of authorities that, in a case of this description, the Court, whether the King's Bench Division or the Court of Appeal, would make no order in vain. I entirely agree in that, but the order of the King's Bench Division may have consequences entirely different from those which Serjeant Moriarty and Mr. M'Sweeny appear to expect, and there is no reason to suppose that the result of a legal and proper election will be the appointment of one or other of the candidates at the last election, or that whoever may be elected will not be a fit and proper person to occupy the post. I am clearly of opinion that neither *R. v. Griffiths* (5), nor *R. (Whitley) v. Justices of Co. Cork* (6), in which

(1) [1903] 2 K. B. 693, at p. 699.

(2) 1 Chitty, 700.

(3) 18 Q. B. D. 349.

(4) 1 East, 79.

(5) 5 B. & Ald. 731.

(6) 43 L. T. R. 133.

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R. v. Griffiths (1) was followed, affects the present decision. In *R. v. Griffiths* (1) the Court refused to make absolute a conditional order for mandamus, the only effect of which would have been to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner. Best, J., says at p. 737 of the report—"By restoring Mr. Griffiths, instead of advancing justice, which is the object to be maintained by a mandamus, we stop the course of justice at Bristol, until he shall be regularly removed, and another person again appointed in his place." The "long line of authorities" referred to by Serjeant Moriarty, commencing with *Rex v. Mayor of Colchester* (2), when carefully examined, comes to this, that mandamus will not be granted in cases where *quo warranto* lies. It appears to me that Lord Campbell in *Frost v. Mayor of Chester* (3) explained the law in the clearest possible terms, and when that case is rightly considered, it is an authority against, and not in favour of, Serjeant Moriarty. There Lord Campbell was of opinion that *quo warranto* lay, and, therefore, that it was not a case in which the Court ought to be asked for a mandamus.

Mr. Sullivan has cleared up a difficulty which, not being so familiar with this branch of the law as my learned brethren, I was glad to have cleared up for my own satisfaction. He pointed out that even in cases where a writ of *quo warranto* has issued, the effect is merely a judgment of ouster. If further proceedings become necessary, the prosecutor must come back to the Court for a writ of mandamus directed to the proper persons to hold a new election, or to declare that the prosecutor was duly and properly elected to the post. In other words mandamus is the sanction which gives *quo warranto* force and validity.

I come now to the judgment of the Lord Chief Baron in *M'Devitt's Case* (4), and I need not repeat what the Lord Chief Justice said that this was the unanimous judgment of a Court of very high authority. I may with all respect say that it, in my opinion, concludes the case in favour of the applicant here. The Lord Chief Baron there says—"On the second question, as to

(1) 5 B. & Ald. 731.

(2) 2 T. R. 259.

(3) 5 E. & B. 531.

(4) 35 I. L. T. R. 12.

whether mandamus is the proper remedy or whether *quo warranto* lies in such case, it is well settled law that if the office is one held at the will and pleasure of the party or body having the power of appointment thereto, the writ *quo warranto* does not lie," and after dealing with the authorities the learned Judge held that the writ of mandamus should go.

The attempt to distinguish *M'Devitt's Case* (1) from the present case entirely fails in my judgment, because the Lord Chief Justice of Ireland in the present case has put on record that the learned Serjeant absolutely declined to argue any point in the case except the one, namely, that in this case, the office being *de facto* full, no writ of mandamus could issue. The learned Serjeant said that he was not concerned with the construction of the Act of Parliament, and that one good point was worth forty bad ones, and, in my judgment, the learned Serjeant having elected to take that course, must be deemed to have argued this case in the King's Bench Division on the assumption that the election was invalid, but that, notwithstanding the invalidity of the election, his client, being *de facto* in office, was entitled to ask the Court to refuse the application on the ground that his client was then *de facto* in office, and could only be removed by an order of the Lord Lieutenant or the Lords Justices. I am unable to accede to that argument.

To sum up I may quote the words of May, C.J., in *Ex parte Johnston* (2). "Now, with respect to applications to the Court to issue a prerogative mandamus, it is established that a writ will not issue unless in a case where no other legal remedy is possessed by the applicant, and, further, this Court will not direct such a writ to issue to enforce a discretionary duty." In the present case the duty is not discretionary but mandatory, and there is no legal remedy save mandamus open in the King's Court.

It appears to me to be clear from the decision of the Lord Chief Baron in *M'Devitt's Case* (1), and the other authorities mentioned, that mandamus lies in a case where *quo warranto* is not applicable, and that the Court ought not to sanction the suggestion that the King shall have no remedy in such a case as this, be the election never so invalid.

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(1) 35 I. L. T. R. 12.

(2) 20 I. L. T. R. 76.

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I adopt the judgment of the Lord Chief Justice in its entirety, and I only regret that I have taken so long in paraphrasing his decision.

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PALLES, C.B. :—

I agree with the Master of the Rolls that this appeal should be dismissed. Mr. Sullivan's argument is—1, that the election already had is void, and consequently that a statutory duty in which the King as representing the public is interested remains unperformed; 2, that in such a case a mandamus lies to enforce the performance of that duty, unless there be some other legal remedy; 3, that as admittedly *quo warranto* does not lie in reference to such an office as that of Petty Sessions clerk, there is not in the present case any other legal remedy. The question for us is, are these propositions true? As to the first viz., that the election already had is void, its validity was challenged by the prosecutor upon the facts stated in the affidavits filed on his behalf; the learned Serjeant who appeared for the defendant in the Court below declined to argue to the contrary in that Court, although pressed by the Judges to do so. That Court, in the absence of any argument for the defendant, decided against the validity of the election on the ground that the defendant had not the majority of legal votes, and of course we cannot permit the question deliberately refrained from being argued there to be discussed here.

Under these circumstances we must on this appeal act upon the assumption that there was not a majority of legal votes in favour of the defendant, and consequently that his election was void. Thus the first of Mr. Sullivan's propositions must for the purpose of this motion be taken to be established. As to the second proposition, I have always regarded it as an elementary one. I do not, nor in *M'Devitt's Case* (1) did I, think it necessary to cite any authority to establish it, because unless it be true the King would be powerless to enforce the performance of the public duty; but if authority be required, the judgment of Patteson, J., in *R. v. The Minister and Churchwardens of Stoke Damerel* (2), cited

(1) 35 I. L. T. R. 12.

(2) 5 A. & E. 584-590.

by Mr. Sullivan, is amply sufficient. I believe that many other cases to the same effect might be cited. In that case the office in controversy was that of a sexton, and the writ of mandamus was refused because the Court held that there was another remedy, *i.e.*, an action for money had and received for fees of office. In his judgment Patteson, J., said (p. 590):—"But I am confident that, if the question cannot be tried by a *quo warranto*, the course is to grant a mandamus for a new election, where the Court is satisfied that the first election is void. Where there is any other mode of trying the right, a mandamus ought not to go. . . . If there were no other remedy, I should say that a mandamus ought to go."

As to the cases cited by Serjeant Moriarty, in all but one of them a proceeding by *quo warranto* was applicable; therefore there was another remedy, and consequently these cases are not in point.

The remaining case cited by Serjeant Moriarty: *R. v. Justices of Herefordshire* (1), appeared at first sight to be in favour of the defendant by reason of some of the observations of the Judges. Upon consideration, however, it will be found to be distinguishable. There the application was in the first instance for a writ of *quo warranto* directed to the county treasurer of Herefordshire, calling upon him to show by what authority he held the office of county treasurer. The Court having intimated that a writ of *quo warranto* would not lie in reference to such an office, the counsel for the applicant shaped his motion anew, and applied for a mandamus. The objection to the election there was that one of the Justices who voted at the election had not duly qualified himself by taking the prescribed oath.

In refusing the application for the mandamus, each of the three Judges before whom the case was moved stated his reasons—reasons which were not confined merely to the office being full *de facto*. Abbott, C.J., said:—"We cannot grant a mandamus to fill up such an office as this, unless it is actually void. This office is full *de facto*, and we cannot say that the act of the Justice who had not taken the qualification oath is void. In a very few weeks the

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acts of this magistrate would be rendered completely valid by an indemnity act, and he will be a good Justice." Whether the reason is sound in law or not, it is the Chief Justice's *ratio decidendi*, and if the act of the Justice was not void, neither could be the election.

Bayley, J., says twice in the course of his judgment that "the acts of the Justices are valid" and the judgment of Holroyd, J., is to the same effect. That is, instead of grounding their decision merely on the fact that the office was full *de facto* they rely upon it being full both *de facto* and *de jure*. This case therefore is not an authority for the defendant here. Upon the simple ground then that the King would be unable to enforce in his own Court the performance of a duty in which he as representing the public is interested, were this argument for the defendant to prevail, I have no doubt that it is unsustainable; and that a proceeding for a mandamus lies, in such a case as the present, if there is no other legal remedy.

As to the third proposition of Mr. Sullivan, viz., that in the present case there is no other legal remedy, it was practically admitted by the learned Serjeant. The case of the applicant is consequently complete. Serjeant Moriarty has argued that the decision in *M'Devitt's Case* (1) was based on an admission that the appointment was a colourable one. I must say that that argument has no foundation in fact. The only admission there was that the appointment was void, not that it was colourable, nor in giving judgment did I hold that it was so. I thought that the jurisdiction rested on the fact that the appointment was void. Whether that conclusion is arrived at by admission or decision cannot possibly make any difference in law.

HOLMES, L.J.:—

I concur. It seems to me that the course taken by Serjeant Moriarty in the Divisional Court enables us to dispose of this appeal without any difficulty. We must assume that although Whitley has for some time been performing the duties of clerk

(1) 35 I. L. T. R. 12.

of Petty Sessions, he has not been legally appointed to that office. Serjeant Moriarty in the Court below refused to argue in support of the validity of his election, and we cannot permit him to take up a different attitude here. It is admitted that an information in the nature of a writ of *quo warranto* would not lie, as the office is not a freehold one, nor one of a character to which such a mode of procedure is applicable, therefore we must look elsewhere for a remedy.

What is the proper remedy? It is, that a new legal election should be held; and I see no grounds why a writ of mandamus should not issue to compel the holding of such an election.

It being admitted that the former election was invalid, we are asked to direct a new election, and accordingly we do so.

Solicitor for the prosecutor: *J. Travers Wolfe.*

Solicitor for Samuel Whitley: *P. J. Collins.*

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May 17, 18. *Land Law (Ireland) Act, 1896, s. 40—Tenant accepting offer—Prolonged*
Appeal. *interval prior to completion—Liability of tenant-purchaser when sued for*
 June 20. *sum less than either rent or interest on purchase-money.*

Where a tenant in 1902 accepted the offer for sale of his holding made by the Land Judge under section 40 of the Land Law (Ireland) Act, 1896, and, from causes for which the tenant was not responsible, the sale was not completed in 1909, although good title was shown by the landlord :

Held, by the Court of Appeal, affirming the order of the King's Bench Division, that the tenant was liable to pay a sum for which he was sued by civil bill, pursuant to leave in that behalf of the Land Judge, less than either the rent or interest on the purchase-money, irrespective of section 35 of the Land Law (Ireland) Act of 1896, which by agreement of counsel, on which the Court acted, was assumed not to be applicable to the case.

CASE stated by Gibson, J., on the hearing of an appeal at the Maryborough Spring Assizes, 1910, from a dismiss dated the 1st July, 1909, in a civil bill action for £20.

The plaintiffs were Frank Donaldson, owner of the lands mentioned in the civil bill, and Ernest H. Browne, the Receiver over his estate. The defendant was tenant of the lands, and had agreed to purchase his holding. The claim of the plaintiffs as set out in the civil bill was for "£20 for money due by the defendant to the plaintiffs for interest on the purchase-money for part of the lands of Barkmill in the Barony of Maryborough West, containing 22A. 3R. 27P. payable by the defendant to the plaintiffs pursuant to an order made in the matter of the estate of the Rev. Sir John Wolseley, owner; *Ex parte* Charles J. Battersby, petitioner; continued in the name of Frank Donaldson, surviving

(1) In the King's Bench Division before PALLES, C.B., and KENNY and WRIGHT, JJ.

trustee of the will of the said Rev. Sir John Wolseley as owner, further continued in the name of Major T. Preston Battersby, executor of said Charles J. Battersby, as petitioner; by the Right Hon. Mr. Justice Ross, and dated the 29th March, 1909.”

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The estate was one to which section 40 of the Land Law (Ir.) Act, 1896, applied, and by order of Ross, J., made on the 21st March, 1901, on receiving the report of the Land Commission, filed the 30th November, 1900, it was ordered that the fee-simple of the several holdings in the schedules to the order should be offered to the tenants at the prices therein specified, and amongst others the defendant was offered his holding held at a rent of £10 10s. at the price of £180 Guaranteed Land Stock. This offer was accepted by the tenant in writing on the 28th June, 1901.

By a further order of Ross, J., dated 12th December, 1902, reciting that the said offer had been communicated to the defendant and had been accepted by him, and that the Estates Commissioners had sanctioned the advance, it was ordered that the defendant should be entered in the general sale book as purchaser of the said holding. It was admitted that since the order of the 21st March, 1901, the defendant had paid neither interest nor rent. By order of Ross, J., of the 30th July, 1908, it was referred to the Land Commission to make vesting orders in respect of the tenants, including the defendant, but without collecting interest from them in respect of the period between the 21st March, 1901, and the date of the vesting orders. By a further order of Ross, J., dated the 29th March, 1909, reciting that a stay had been put upon the vesting orders in the cases of certain tenants (including the defendant) by reason of certain exchanges of occupation and consequent amendments in the rental and upon application by the petitioner that the vesting orders should be made with the necessary amendments as regards areas, which was adjourned for notice to the tenants who (including the defendant) appeared on the adjourned hearing by solicitor, it was ordered, “notwithstanding said order, dated 30th July, 1908, that the tenants named in the schedule hereto do pay to the Receiver the sums set opposite their respective names in the said schedule by way of interest on the purchase-moneys of their

K. B. Dic. 1910. respective holdings since the date of the order directing the offers to be made to them, and that it be referred to the Land Commission to make, upon notification that the said sums have been paid, the vesting orders in respect of the holdings of the said tenants, the areas of the said holdings being amended as set out in the schedule hereto." In the schedule to this order under a column headed "Amount to be paid by tenants on foot of interest on purchase-money," the defendant's name appeared for £20. The tenants having refused to pay, by order of Ross, J., dated the 20th April, 1909, the solicitors having carriage of the sale were directed to be at liberty to proceed against the tenants, or any of them, for arrears of rent or interest on their purchase-moneys, or on account of their use and occupation of the lands or otherwise as the said solicitors might be advised. In pursuance of this order the civil bill action in the present case was commenced.

It was stated in the case that the question at issue depended entirely on the effect of the Land Purchase Acts and the orders hereinbefore set out; that there had been no vesting order; and that the sum fixed for interest by the order of Ross, J., was reasonable if the defendant was liable for interest. The learned Judge allowed the Land Commission to be joined as co-plaintiffs, if they would consent, on being indemnified from all costs. The Court was to be at liberty to draw all reasonable inferences of fact. The learned Judge stated that the point raised seemed to him of some difficulty, and of general importance; in reference to sales under section 40 of the Land Law (Ir.) Act, 1896.

The questions reserved for the decision of the Court were:—

1. On the facts and orders above stated, is defendant liable for (a) interest; or (b) rent?
2. Are the landlord, vendor, and receiver, or is one and which of them, entitled to sue for such interest?
3. Is the Land Commission entitled to sue?
4. Should the dismiss be affirmed or reversed?

Question 1 (b) was added at the request of counsel for the *K. B. Div.* plaintiffs. 1910.

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Chaytor, K.C., and Cecil Eforde, for the plaintiffs.

Molony, K.C., and D. J. O'Brien, for the defendant.

The arguments are sufficiently referred to in the judgment of the Lord Chief Baron.

PALLES, C.B. :—

The amount involved in this case is small, but the principles upon which the decision must rest are of far-reaching importance. The contract for sale was entered into upon the 8th of June, 1901. The tenant has remained in possession from that date until the present time, and during that period he has paid neither rent for his holding nor interest upon the purchase-money he contracted to pay. The landlord has been in no default; he has shown title to the estate. Mr. Molony has addressed to us an able argument to show that, no matter how long the delay may be upon the part of the Land Commission in making up their minds whether they will advance the money or not, his client is nevertheless entitled during such period to remain in possession of the lands without paying either rent or interest. That is the proposition of law which we are asked to affirm, and if it be the law, having regard to the delay—which it is a matter of common knowledge exists—upon the part of the Treasury in advancing purchase-money under the Acts in question, any landlord who contracts to sell may be practically ruined without any default or breach of contract on his part. For an unknown length of time, to be measured only according to the volition of the Treasury, he may be deprived of his entire income.

Now is this, or is it not, the law?

It is admitted that the 35th section of the Act of 1896, either does not apply or is, by agreement of the parties, to be taken as not applying. I have not considered and I do not offer any opinion on the question, whether it would apply or not; that is matter that might involve considerations upon which I do not enter. But we start on the common basis that this case is to be treated as if that section did not apply.

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We have to commence then with the 40th section of the Act of 1896, which by clause (a) enacts that—

“The Land Commission shall, at the request of the Land Judge, cause the estate to be inspected, and a report to be made by two Commissioners respecting the estate, and the circumstances thereof, and the prices at, and the conditions under which, the sale of the holdings to the tenants under the Land Purchase Acts can properly be made.”

Then the Land Judge by clause (b) of the section is directed as follows:—

“The Land Judge, after giving all parties, including the tenants, an opportunity of being heard, and considering the report and any offers that may be made for the purchase of the estate or any part thereof, and any other matters that may be brought before him, and the general circumstances of the estate, shall make to the person appearing to be in occupation as tenant of each holding on the estate an offer to sell to him the fee-simple of the holding, discharged from the arrears of rent then due from him in respect thereof, at such a price, and subject to such conditions whether as to payment of part of the price in cash, or as to the offer to one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time, or otherwise, as the Land Judge may consider reasonable and just.”

Then by clause (c)—

“The offer shall be communicated in such a manner as the Land Commission think fit to the person appearing to be in occupation as tenant, and, if it is accepted, then on fulfilment of the conditions the said person shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, and the sale shall be completed accordingly.”

In the present case the offer is in these words:—

“In pursuance of section 40 of the Land Law (Ireland) Act, 1896, the Honourable Mr. Justice Ross, one of the Land Judges, hereby offers to sell to you the fee-simple of the holding described in the schedule hereto, discharged from all arrears of rent due by you in respect thereof, and from all superior interests, at the price,” &c.

The price is then set out and there is a reservation to the Judge of—

“the right to cancel this offer in the event of any one or more of the other persons to whom offers have been or shall be made for the purchase of their respective holdings on this estate refusing or neglecting to accept such offers within fourteen days after the same shall have been communicated to them respectively.”

In the fold of that document there is a letter from Mr. Franks to the tenant in which the tenant is informed that in the event of his requiring an advance from the Land Commission of the whole or any part of the price, he should fill in a form of application which is annexed.

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The effect of that agreement is to make the tenant a person "who has agreed to purchase a holding within the meaning of the Land Purchase Acts"; and, therefore, to entitle him to apply to the Land Commission, and, if his application be granted, to obtain from them either the entire amount of the purchase-money or such amount thereof as the Land Commission may think fit to advance. But the agreement is one which, in point of law, is not subject to any express condition which makes it contingent upon the advance being obtained. It is an ordinary agreement to sell at a certain specific sum. A sale *in presenti* is contemplated. No time for completion is fixed, but, at the same time, undoubtedly it was the intention of all parties that the tenant should be able to get the purchase-money from the Land Commission, and that by reason thereof he should be able to carry out the purchase.

What are the rights of the parties under an agreement of that description? It contemplates a change of the relation of landlord and tenant into that of vendor and purchaser, at the time which a Court of Equity would deem to be the time when it ought to be completed, having regard to the conduct of the parties and the making of title to the estate. From that time the vendor is entitled (in default of payment of the purchase-money) to interest upon it.

It has been found by Gibson, J., that a good title was shown, at a period prior to that from which the interest has been calculated. Thus everything has been done upon the part of the landlord that ought to have been done by him. Why, then, upon ordinary principles, is not the landlord in a Court of Equity entitled to that interest. In an ordinary case, where the Land Purchase Acts did not apply, the default would be upon the tenant in not tendering his conveyance and paying the purchase-money. If it be said that, having regard to the Land Acts, it should be held that the agreement contemplated that the conversion should not be until a subsequent period, it would only burden

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A number of other matters have been argued or suggested which in some other case it may become necessary to determine, but which do not arise now. There may be a question as to the exact period of time at which, under an agreement of this description, the conversion is to be deemed to take place, and possibly as to the form of pleading by which the sum due would be recoverable. In the present case, however, there is a *legal* obligation to pay rent, and *prima facie* a civil bill might well lie claiming the sum of money as rent. In such a case if the tenant came in, and relied upon his agreement in equity, his right to the benefit of that equitable defence would impose upon him the performance of the obligation on his part which arose out of that agreement; and if, as in this case, there is an obligation arising under the agreement to pay interest, the Court ought to refuse to relieve from the rent to any greater extent than to the amount by which it exceeded the sum due for interest, and should therefore on such a civil bill make a decree for the balance. Whether the decree were given as for interest or for rent, would seem to me to be absolutely immaterial.

For these reasons I think that law happily concurs with justice, and that this tenant is liable to pay at least the amount sued for. He must also pay the costs of the appeal, and of this argument.

KENNY, J. :—

I concur. The tenant-purchaser has paid neither rent nor interest for a period of nine years—from 1901 up to the present time,—and during that time the landlord has had no income from this portion of his estate. In March, 1909, Mr. Justice Ross took a very generous view of the tenant's liability, and, regarding him as a tenant under the Land Purchase Acts, directed that he should pay the comparatively small sum of £20. That order the tenant did not object to, though he could have appealed from it. Whether the claim here is to be regarded as interest or as rent, I think that a great injustice would be done if the tenant were to succeed in his contention. In my opinion, he is, clearly, at least liable for interest, and I cannot help thinking that there is an element of fraud in this effort on his part to escape payment of anything.

WRIGHT, J. :—

I concur. It is agreed that section 35 of the Act does not apply. However the case is looked at, the tenant is, in my opinion, liable. He could be held to be liable under the order of Mr. Justice Ross, without anything further. That was an appealable order, and he has not appealed from it. But I do not base my judgment upon that ground. I base it upon this: Whether the agreement is looked upon as an agreement between landlord and tenant merely; or, as I think it may be, as an agreement between landlord and tenant, conditional upon a third party doing something; in either case the tenant is liable. I think it was an agreement by the landlord to sell, upon a condition being performed by a third party; and until that condition was performed—until the purchase-money was found, the tenant was nothing more than a tenant in possession under an agreement for purchase, and, in my opinion, an action for rent would lie against him to which he would have no answer, except to set up the agreement for purchase, which would render him liable for the payment of interest.

The Court answered the questions as follows:—

1. That on the facts and orders above stated the defendant is liable for the £20 sued for in this action.
2. The landlord is the person to sue.
3. Not necessary to answer, and does not arise.
4. That dismissal should be reversed.

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The defendant appealed (1).

Molony, K.C. (with him *D. J. O'Brien*), for the appellant :—

The question here is, can a tenant-purchaser who has accepted an offer under section 40 of the Land Law (Ir.) Act, 1896, be sued for rent or interest pending the completion of the sale? Section 35 of that Act would seem *prima facie* to be conclusive, but it has practically been admitted by the parties here that the section does not apply to sales within section 40, and I do not therefore rely on it. But in the absence of any special agreement as to payment of rent or interest while the proceedings in the Land Commission Court are in suspense from whatever cause, neither rent nor interest can be claimed: *Hussey v. Morgan* (2) (an unreported decision of Palles, C.B., under the Land Commission Rules of October, 1885), referred to in Cherry's Land Law and Land Purchase Acts, 2nd ed., 424. *The King (Fitzwilliam) v. Wicklow County Council* (3) is conclusive as against liability for rent. Section 40 does not contemplate payment of interest pending completion. It must be presumed that the Legislature when enacting the section was aware of the decision in *Hussey v. Morgan* (2), the date of which was the 10th May, 1888. Interest is only payable after conveyance. Here a vesting order may never be issued: *Vickery v. Deane* (4); *Shaw v. Foster* (5). Lord Cairns in that case (p. 338) said—"Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of the Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property of the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property."

In this case, though a vesting order was made, a stay was put upon its being issued.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) Unreported.

(3) 40 Ir. L. T. R. 108. See this case explained in *In re Lynders*, [1910] 1 I. R. 231, at p. 236.

(4) 32 L. R. Ir. 96.

(5) L. R. 5 H. L. 321.

As to the order of 29th March, 1909, there was no jurisdiction under section 40 of the Act of 1896 to make an order dealing with interest. If it is to be taken as having been made under the general jurisdiction of the Land Judge, the remedy for disobedience of it would be by attachment. But that was not the view taken by Mr. Justice Ross of his order. When the non-compliance with it was brought under his notice, he simply gave the parties interested liberty to enforce their alleged rights in an altogether independent tribunal.

Until the Irish Land Act, 1903, no interest on the purchase-money could be recovered in the case of sales under the 40th section of the Act of 1896. What would have been the necessity of the 57th section of the Act of 1903, if the purchaser at such a sale were antecedently liable to interest? When the offer was made to the tenant under section 40 of the Act of 1896, sub-sect. 1 (b), was the time at which (if at all) the Land Judge could have made the payment of interest a condition.

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Chaytor, K.C. (with him *Cecil Fforde*), for the respondents :—

We relied in the Court below upon three points—

1. The tenant was liable for interest on his purchase-money under the ordinary law of vendor and purchaser.
2. The order of 29th March, 1909, worked an estoppel. I will not however, press this point here.
3. We were entitled to recover rent at common law, if we could not get interest.

Hussey v. Morgan (1) has no application to cases coming under the 40th section of the Act of 1896. The Land Judge is bound to make the offer. The Land Commission have no voice in the matter: *Fry on Specific Performance*, s. 1445; *Dart, Vendors and Purchasers* (7th ed.), p. 652: "If no time be fixed for completion, the purchaser pays interest on his purchase-money, unless lying idle with notice of that fact to the vendor, from (it is conceived) the date of the contract if the purchaser is then in possession; or if he is not then in possession, from the time of his taking possession; or from the time at which he might prudently have taken

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possession if it was offered to him—*i.e.* the time when a good title was shown ” ; and at p. 710, “ The cases seem to show that where a purchaser is in actual possession or receipt of the rents and profits he must pay interest upon his purchase-money (unless lying idle with notice of that fact to the vendor), from the time fixed for completion, even though the vendor delay to show a good title ; and the contract does not in terms make the purchase-money payable until a good title is shown.”

Even if the tenant is right about interest, we could sue him for rent. His only defence to that action would be that he was in possession, not as tenant but as purchaser, involving liability to interest. The Lord Chief Baron’s judgment upon this view of the case is unanswerable.

THE LORD CHANCELLOR :—

We are all perfectly satisfied with the order made by the King’s Bench Division. I rely on the Chief Baron’s judgment, which meets the law and justice of the case. Mr. Molony in his argument hovered between the position of the defendant as tenant or as purchaser under the agreement of the 8th of June, 1901. He does not wish his client to be treated as being in the position of tenant, because as tenant he would be liable for rent ; and he does not like him to be dealt with as a purchaser, for in that case he would be liable for interest.

In my opinion, having regard to the documents and the facts, the relation of vendor and purchaser was created between the parties on the 8th of June, 1901, when an offer to purchase was made and accepted in writing, and a sum named, £180, as the sum to be advanced. The advance was provisionally sanctioned. Nobody suggests that there is any difficulty about the title. The defendant remained on in possession of the lands as tenant. But from the time when he was transmuted into an equitable owner, he would be liable to pay interest. I am not sure that he would not be liable for rent, but he could only defend an action for rent by setting up the equitable defence that he was in possession as purchaser. But if he did so, he would be met by the rule of equity that he must do equity by paying interest. There is really

nothing in this case. I rest on the judgment of the Chief Baron. It is clear and exhaustive. If the defendant be equitable owner, he must be and is liable for interest.

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HOLMES, L.J. :—

The best argument I think Mr. Molony would have is one which, though he suggested, he did not rely on, namely, that if interest is due, it was not the landlord but the Land Commission who would be entitled to receive it. But, as the Chief Baron says, this point was not referred to in the Court below; and I think the section (section 35 of the Act of 1896) does not apply, for the reason mentioned by Mr. Chaytor, that it only applies where there is a contract between the Land Commission and the tenant and the landlord. To ascertain the rights of the parties here, we must apply the general law. Here a good title has been shown, a vesting order has been made, and on payment of interest will be issued. The tenant is bound to pay interest.

CHERRY, L.J. :—

I entirely concur. I agree with every word of the Chief Baron's lucid and able judgment. Mr. Chaytor based his argument on the ordinary law and the particular words of the Land Purchase Code. According to the ordinary law of vendor and purchaser, if a purchaser before he pays his purchase-money goes into possession, he will be compelled by a Court of Equity to pay interest at a reasonable rate on the purchase-money till he pays the principal. Is there any reason for holding that there is a difference when the purchase is effected under the Land Purchase Code? I think not. In *Hussey's Case* (1) and *Vickery v. Deane* (2) and other cases of that class before the Act of 1896, it was always assumed that the liability to pay interest would be governed by the ordinary law. The only difficulty that arose was to determine whether interest or rent was payable. But it does not matter whether you call the sum which the tenant-purchaser is asked to pay "rent" or "interest,"

(1) Unreported. Cherry's Land Law Acts (2nd ed.), 424.

(2) 32 L. R. I. 36.

Appeal. if he is only asked to pay the lesser of the two sums. The
1910. liability for rent or for use and occupation in the present
DONALDSON case would be for a much larger sum than he is now asked
v. to pay ; so it is not material whether he pays it as rent or
MEREDITH. interest. It is quite clear that when a tenant purchases, either
Cherry, L.J. under the ordinary law or the Land Purchase Code, he must
be liable to pay either rent or interest so long as he continues
to have the use of the land before the purchase-money is paid to
the vendor. I can see nothing in section 40 of the Act of 1896
to make any difference in cases of purchases under that section.
Sub-section 1 (c) provides that "the offer shall be communicated
in such manner as the Land Commission think fit to the person
appearing to be in occupation as tenant, and, if it is accepted,
then, on fulfilment of the conditions, the said person shall be
deemed to have agreed to purchase the holding within the mean-
ing of the Land Purchase Acts, and the sale shall be completed
accordingly."

The sale is completed accordingly in the ordinary way, and
the tenant is in the same position, in all respects, as if the sale
had been carried out by a voluntary bargain under the Land
Purchase Code. All that the section does is to give him a right
to purchase; but if he exercises that right, he can only do so upon
the same terms exactly as if he had been a purchaser by
voluntary agreement with his landlord.

In the present case the amount that the tenant is asked to pay
is very small. It is less than 2 per cent. on the purchase-money
for the period he has been in occupation since his acceptance of
the offer of the Land Judge. He has been treated with great
liberality; other tenants in a similar position are usually obliged
to pay double that amount. He has neither merits nor legal
right in refusing to pay this small sum of £20.

Solicitors for the plaintiffs: *Croker, Moran, & O'Brien.*

Solicitor for the defendant: *W. X. White.*

W. G.

TOBIN, APPLICANT; HEARN AND ANOTHER,
RESPONDENTS (1).Appeal.
1910.
June 20.

Workmen's Compensation Act, 1906, s. 1 (1)—Factory rules—Authority of overseer—Reasonable action of employee pursuant to specific order—Course of employment.

A boy employed in the respondents' boot factory was engaged at his ordinary work upon a machine in the finishing-room on the upper story. By the factory regulations the hands were forbidden to change from one machine to another. An imperfectly moulded in-sole was brought up amongst others to the finishing-room from the ground floor. An overseer directed him to bring the in-sole downstairs and have it remoulded. The boy had not been expressly forbidden to touch the moulding machine. The operator in charge of this machine was temporarily absent, and the boy did not wait for his return, but attempted to remould the sole himself, and in doing so, received injuries which resulted in the loss of three fingers. On an application for compensation the County Court Judge found that the accident did not arise out of and in the course of his employment.

Held, that there was no evidence upon which the learned Judge was justified in so finding; and that the applicant was, therefore, entitled to compensation under the Workmen's Compensation Act, 1906.

APPEAL from an award of the County Court Judge of Waterford, dismissing a claim brought by the applicant under the Workmen's Compensation Act, 1906.

In his notes the learned County Court Judge stated: This was the case of a boy who was employed in the respondents' boot factory in Waterford. He worked in an upper apartment called the finishers', or finishing, room. On the day of the accident he was sent down to another floor by a man named Madigan, with a sole which had been defectively or insufficiently moulded, to have it remoulded before being made up. I had not time to go

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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to see the moulding machine, as I should have done if the Sessions had been lighter; but it was described to me as a machine in which the sole, which had been previously cut out by another machine, and softened by being soaked in water, was inserted in a particular way, and was then, the power being supplied or applied by a treadle, crushed or moulded into the proper shape. When the boy arrived at the moulding machine, the lad who operated it was momentarily absent, and the boy proceeded to operate it himself, with the result that his hand was caught in it, and he received injuries which ultimately led to the amputation of three fingers. I held that the accident did not arise "out of and in the course of his employment." He was not sent there for that purpose, had no business to handle the machine, and in fact was forbidden to do so (i.e. by the regulations of the factory, though not specifically warned on this particular occasion). The boy himself stated that he was ordered by Madigan to go and mould the sole himself, but I did not accept or believe his statement. He also said that he had frequently moulded soles there before, and that he had once been put to work at it for as long a period as a fortnight, and that he thoroughly understood its working, but all these statements were to my mind disproved, and were in fact untrue. The conclusion I arrived at was, that the boy was not sent to work the machine himself; had in fact never done so before, and did not understand its working: I believe that, finding the lad who operated the machine absent, he was tempted by curiosity to see how the machine worked—to operate it himself. There were other machines for moulding the uppers or other parts of boots and shoes, and the boy having stated so specifically that he had been put to work at moulding for a fortnight, I thought the explanation might be that he had been put to one of those other machines, which are of a different sort and worked in another way; but this was denied, and I believed the denial.

Robert Kinahan, for the applicant:—

The evidence given in the Court below to support the finding of the learned Judge merely disclosed disobedience to general disciplinary regulations drawn up for the employees in general.

This is not sufficient. The appellant had received no express prohibition with regard to the particular machine: *Whitehead v. Reader* (1). The sphere of the applicant's employment was not rigidly defined, and the re-moulding of a sole was not an act so remote from his ordinary duties, involving work on other machines, as to disentitle him to receive compensation in the event of injury. *Lowe v. Pearson* (2) is distinguishable. There the applicant was employed solely for unskilled labour, and received express orders not to touch the machinery; further, the act was done voluntarily. *Losh v. Evans* (3) is distinguishable also. In that case the employment of the applicant, a girl, was in no way connected with machinery, and when about to operate it of her own accord, she was warned by her fellow-workers not to do so. In this case, moreover, the applicant believed he was furthering his masters' interests in what he, perhaps erroneously, deemed an emergency: *Harrison v. Whitaker Brothers, Limited* (4).

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W. M. Whitaker, K.C., for the respondents:—

The applicant is clearly not entitled to succeed, as there is evidence to support the finding of the County Court Judge, and such finding of fact cannot be disturbed. He relied entirely on *Lowe v. Pearson* (2). It was no part of the applicant's duty to touch the moulding machine. He should have summoned, and waited for the arrival of, the operator usually in charge. In failing to do so, he voluntarily and consciously stepped outside the sphere of his employment, and brought himself within the principle of *Lowe v. Pearson* (2). Whilst the accident might not be attributable to misconduct, it clearly did not arise out of and in the course of his employment.

THE LORD CHANCELLOR:—

We think that in this case the learned County Court Judge ought to have found that the accident arose out of and in the

(1) [1901] 2 K. B. 48.

(3) 19 T. L. R. 142.

(2) [1899] 1 Q. B. 261.

(4) 16 T. L. R. 108.

Appeal. course of the applicant's employment. He did not find that there
 1910. was any wilful misconduct, nor was a case of wilful misconduct
Tobin, made here by counsel for the respondents. At most the applicant
Applicant; can only be accused of a breach of general regulations. He was
Hearn and told by his immediate superior to go down from the place where
Another, he was working to a lower floor to get a sole re-moulded. When
Respondents. he got down, he found no one there, and he proceeded to apply the
 The Lord machine himself, and, being inexperienced in using it, injured
 Chancellor. himself. A certain amount of discretion must be conceded to an
 employee when confronted with a situation of this kind. In trying
 to do the work himself, he was acting under the mistaken idea
 that he was furthering his masters' interests. This is not denied.
 He was accustomed to work on machinery, though of a different
 description. He was doing his best for the employers, and I think,
 therefore, the accident arose out of and in the course of his
 employment.

The case must be remitted to the County Court Judge, with
 our declaration of opinion.

HOLMES, L.J. :—

I concur, and I base my judgment on the notes of the learned
 County Court Judge. It is not disputed that Madigan had
 authority to direct the applicant to have the sole re-moulded.
 It was only to be expected that the boy, when he found no one
 in charge of the moulding machine, would try to do the work
 himself. I am clearly of opinion that the accident arose out of
 and in the course of his employment. Wilful interference with
 dangerous machinery, in disobedience to orders, has not and could
 not be found.

CHERRY, L.J. :—

I concur. I rest my decision on the case of *Harrison v.*
Whitaker (1). The cases decide that if a workman employed to
 do a particular work goes outside it, and does something else in

furtherance of his master's business, he is still acting in the course of his employment. The facts of this case are very similar to those in *Harrison v. Whitaker* (1). The overseer directed this boy, the applicant, to take down the sole to be re-moulded. He had not been expressly directed not to use the moulding machine. Finding that the man in charge of the machine was absent, he tried to re-mould the sole himself, and in doing so the accident occurred.

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I cannot come to the conclusion that he acted as he did from any motive of mischief or meddlesome curiosity. In my opinion he made an honest attempt in an emergency to do his best, under the circumstances, for his employers' benefit, to further his employers' business; and for this reason I think he must be deemed to have been acting in the course of his employment when the accident occurred.

Solicitor for the applicant: *P. R. Buggy.*

Solicitor for the respondents: *H. D. Keane.*

W. G.

(1) 16 T. L. R. 108.

K. B. Div. 1910.
 June 10, 14,
 21.

THE COUNTY COUNCIL OF THE COUNTY OF CAVAN
 AND THE BAILIEBOROUGH RURAL DISTRICT
 COUNCIL v. KANE, BROTHERS (1).

Highway—Locomotive—Traction-engine—Excessive weight—Injury to highway—Nuisance—Special damage—Road authority—Right of, to sue.

The use of a traction-engine which, by reason of its excessive weight, does substantial and abnormal damage to a public road, adequate for ordinary traffic, is a public nuisance, even though the engine be constructed in compliance with the provisions of the Locomotive Acts, 1861 and 1865.

In such a case the duty cast upon a county council to repair such damage, and the liability of a district council to provide the funds for such repair, amount to special damage, so as to make the owner of the traction-engine civilly liable at the suit of both bodies, suing jointly, for the cost of repairing the road.

Semble, such an action could be maintained by either body suing alone.

CASE STATED by Cherry, L.J., at the Spring Assizes for county Antrim, pursuant to 27 & 28 Vict. c. 99, as follows:—

“This was an appeal from a dismissal on the merits by the County Court Judge of the County of Antrim of a civil bill seeking to recover damages for injuries to a road in the county of Cavan. The said civil bill and dismissal are attached hereto and are to be taken as incorporated in this case (2).

“The original plaintiffs were the County Council only: I made an order adding the Bailieborough Rural District Council as plaintiffs with the assent of the defendants, on the terms of the defendants being allowed their costs in the Civil Bill Court in any event (3).

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, J.

(2) See *post*, p. 646.

(3) These costs were paid by the plaintiffs prior to the hearing of the case stated.

"The following facts were either proved in evidence or admitted before me:— *K B. Div.*
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"1. In the month of June, 1909, the defendants, who are the owners of a traction-engine and train of three waggons, for the purposes of their business sent them from Ballymena to Carrickmacross, the engine-driver keeping by the main roads during the greater part of the journey.

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"2. At one point of the journey, through the mistake of the engine-driver, the train left the main road and passed over a road which, though not a main road, was kept in repair by the plaintiffs at the expense of the ratepayers of the Rural District of Bailieborough.

"3. At the time the injuries to the road complained of in the civil bill were inflicted, the maintenance and repair of the road was provided for by contract; and a copy of said contract is attached hereto and is to be deemed to be incorporated in this case (1).

"4. This road was a public highway, and led to Carrickmacross by a shorter route than the main road.

"5. Though capable of bearing ordinary traffic, it was not strong enough to bear the traction-engine.

"6. The engine sank into the road at one point in the Bailieborough district of the county of Cavan to the depth of about one foot, tearing up and destroying about fifty-eight perches of the road in so doing.

"7. The plaintiffs did not call upon the contractor to repair the damage thereby caused to the road; but proceeded under section 11 of the Local Government (Ireland) Act, 1898, to repair the road, as in case of sudden damage, at the expense of the Rural District.

"8. I found as a fact that the road was in good order prior to the accident, and capable of bearing the traffic ordinarily passing over it.

"9. I also found that the cost of repairing the damage caused by the traction-engine amounted to the sum of £30.

(1) See *post*, p. 647.

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"10. No evidence was given as to the ownership of the soil and freehold of the road.

"No evidence was given, nor was it suggested by the plaintiffs, that the traction-engine was not constructed in compliance with the provisions of section 5 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83), both in respect to its weight and the width of its wheels.

"The questions for the decision of the Court are:—

"1. Was the driving of the traction-engine over the road a wrongful or unreasonable user of same?

"2. Did the acts of the defendants complained of constitute a nuisance?

"3. If either of the aforesaid questions is answered in the affirmative, are the plaintiffs, or either of them, entitled to recover damages for the loss sustained by them in a civil action against the defendants?

"If the 3rd question is answered in the affirmative, the dismissal by the County Court Judge should be reversed, and a decree granted for £30 with costs of appeal; but the costs of the defendants in the Civil Bill Court should be deducted from the amount of said decree, pursuant to the undertaking given to me by the plaintiffs.

"If the 3rd question is not answered in the affirmative, the dismissal of the County Court Judge should be affirmed with costs.

"The claim in the civil bill was as follows:—

"£50 money paid, laid out, and expended to and for the use of the defendants, and at their request, for the repairing of a certain road near the village of Shercock, county Cavan, the property of, or in the custody and control of, the plaintiffs, which was torn up and destroyed by the defendants' traction-engine.

"And for damages for wrongful user by the defendants of a certain road near the village of Shercock, county Cavan, which was torn up and destroyed by the defendants' traction-engine to the plaintiffs' loss in the amount aforesaid.

"And for damages for the excessive user of the said road.

"And for damages in respect of nuisance caused by defendants' traction-engine destroying a county road near the said village of Shercock, whereby the traffic on said road was stopped and hindered, and plaintiffs were put to considerable expense in repairing said road.

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"And for an injunction restraining the defendants from using their traction-engine over and upon the said road."

The contract for the maintenance and repair of the road in question was embodied in the following document:—

"TENDER

"For keeping a road in repair for five years according to the County Surveyor's second-class specification.

"I, James Lee, of Darkley, do hereby propose and agree to keep in repair for $4\frac{1}{4}$ years from the 1st July, 1905, to the 1st October, 1909, 490 lineal perches of the road from Shercock to Castleblayney . . . according to the County Surveyor's second-class specification signed by me, for the sum of twelve pounds five shillings per annum, being at the rate of sixpence per lineal perch . . ."

This tender was signed by the contractor, who named two sureties for the due performance of the work; and the acceptance of the tender was certified by the signature of the chairman of the Bailieborough Rural District Council.

Appended to the tender and acceptance was a recognizance by which the contractor and his two sureties became bound to the County Council of Cavan in the sum of £24 10s. for the due execution of the work in the manner required and agreed on by the contract, and in accordance with the specification, and to the entire satisfaction of the County Surveyor, whose certificate that such work had been so executed was agreed to be necessary for every payment to be made on account of the contract by the County Council of Cavan.

W. Macafee (with him *S. Ronan, K.C.*, and *R. F. Harrison, K.C.*), for the plaintiffs:—

The use by the defendants of a traction-engine, which by reason of its weight destroyed the surface of a public road,

K. B. Div. rendering it impassable, amounted to a public nuisance : *Guardians*
 1910. *Armagh Union v. Bell* (1); see especially the judgment of Sir
CAVAN C. C. P. O'Brien, L.C.J., at pp. 274, 275 of the report. The fact that
AND BAILIE- the engine fulfilled all the requirements of the Locomotive Act,
BOROUGH 1861 (24 & 25 Vict. c. 70), does not absolve the defendants from
R. D. C. liability : *Attorney-General v. Scott* (2); *Guardians Armagh Union*
v. *Bell* (1); section 13 of the Locomotive Act, 1861 (24 & 25
KANE. Vict. c. 70): nor is it any defence to this action to say that
 the plaintiffs should have provided for the contingency of heavy
 locomotive traffic, and that, if they had done so, the road would
 not have been damaged : *Attorney-General v. Scott* (2).

Both of the plaintiff bodies have suffered special damage. The County Council became liable to repair the road : ss. 11 (1) and 82 (1) of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37); and the District Council has had to provide for the expense thereby incurred. The fact that the work of maintaining the road has been given to a contractor does not relieve the County Council from the obligation imposed on it by the statute which I have cited: *The King (Westropp) v. Clare County Council* (3); nor is this duty modified by the special legislation contained in section 7 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70).

The damage done by the defendants' engine was "sudden," within the meaning of section 11 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). "Repair of sudden damage" is there defined as "such repair of any sudden damage to any public work . . . as, subject to the general directions of the County Council, the county surveyor considers cannot, without prejudice to the public, be delayed until the ordinary procedure relating to the repair of public works can be followed."

The County Council is a permanent body, representing the ratepayers of the county, and, as such, is capable of maintaining this action. [On this point he cited *London County Council v. South Metropolitan Gas Company* (4); *Attorney-General v. Logan* (5); *Attorney-General and Spalding Rural Council v. Garner* (6); *The*

(1) [1900] 2 Ir. R. 371.

(2) [1904] 1 K. B. 404.

(3) [1904] 2 Ir. R. 569.

(4) [1904] 1 Ch. 76.

(5) [1891] 2 Q. B. 100.

(6) [1907] 2 K. B. 480.

Mersey Docks Trustees v. Gibbs (1); *Harbinson v. Armagh County Council* (2); *Rennick v. County Council of Wexford* (3); Local Government (Ireland) Act, 1902 (2 Edw. 7, c. 38), s. 17.]

It is not essential to the plaintiffs' right of action that they should have a proprietary interest in the thing affected by the nuisance: *Fergusson v. Malvern Urban District Council* (4).

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McCutcheon, and Gordon, K.C., for the defendants:—

To succeed in an action for nuisance, the plaintiff must show that he has suffered damage either through an injury to his property or an interference with his rights: *Seeds and Kilkeel Rural District Council v. Newry Traction Engine Co.* (5); proof of a mere monetary loss is not sufficient: *Cattle v. Stockton Waterworks Co.* (6). All the cases relied on by the other side are cases in which the *property* of a public body was injured by a nuisance. In the present case the plaintiffs have no property in the soil or surface of the road. In England the case is different: Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68. The passing of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), has made no change as to the *nature* of actions which can be brought by a public body: *Wallasey Local Board v. Gracey* (7); and therefore the only remedy open to the plaintiffs is by indictment for nuisance.

The liability to repair the damage done to the road, and to meet the expense thereby incurred, does not amount to special damage recoverable in an action for nuisance. If it did, then it would have been unnecessary for the Legislature to enact that the road authorities in England should have power to recover expenses caused by extraordinary traffic, as was done by section 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); or as was done by section 7 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70), and by section 9 of the Locomotive Act, 1865 (28 & 29 Vict. c. 83), to cast upon owners of

(1) L. R. 1 H. L. 93.

(2) [1902] 2 Ir. R. 538.

(3) 35 Ir. L. T. R. 78.

(4) 72 J. P. 101.

(5) 37 Ir. L. T. R. 114.

(6) L. R. 10 Q. B. 453.

(7) 36 Ch. D. 593.

K. B. Div. locomotives the liability to pay for any damage caused by them
1910. to bridges, arches, or gulleys.

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The injury done to the surface of the road in this case was not "sudden damage" within the meaning of section 11 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37); sudden damage means some accident which could not have been foreseen or provided for at the last preparation of the estimates; but the use of locomotive traction is now legal, and the road authorities should be prepared for it. In the present case the engine only injured the surface of the road; the foundation was not destroyed.

But whether the damage to the road was sudden or not, the liability of the plaintiff bodies to repair it did not amount to special damage, because it did not affect either their property or their rights. It was merely a liability to discharge a statutory duty, which in this case they could have forced their contractor to perform on their behalf.

R. F. Harrison, K.C., in reply :—

With regard to the contention that the form of this action is misconceived, and that the plaintiffs have not adopted the proper method of enforcing their remedy, there are, since the passing of the Local Government (Ir.) Act, 1898 (61 & 62 Vict. c. 37), a number of actions such as, *e.g.*, *Campbell v. Tate* (1) and *M'Mahon v. Carroll* (2), which could now be brought for or against the ratepayers of a district; but which could not formerly have been maintained, because there was no body which could sue or be sued on their behalf: *Russell v. The Men of Devon* (3). That is the reason why the old remedy in a case of this kind was to proceed by indictment. The modern county council is a statutory corporation capable of representing the ratepayers in litigation: *Rennick v. County Council of Wexford* (4). It has been argued that in a case like the present the Attorney-General could have sued with any member of the public acting as relator, and could have recovered damages; but that is not so. The Attorney-

(1) Ir. R. 5 C. L. 193.

(3) 2 T. R. 667.

(2) Brett's Grand Jury Law, p. 23.

(4) 35 Ir. L. T. R. 78.

General is the representative of the Crown and of the whole community; but he cannot sue for an injury to a limited section of the subjects of the Crown; see *per* Channell, J., in *Attorney-General and Spalding Rural Council v. Garner* (1), at pp. 485-487 of the report.

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Next, as to the argument founded on section 23 of the English statute, the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. 77), which is also in force as regards the districts surrounding Belfast, that section only applies to cases of ordinary wear and tear by locomotive traction causing an increase in the expenditure necessary for the maintenance of the surface of highways; but this is a case of nuisance, pure and simple. The road, which was in good condition, and fit for ordinary traffic, was in a few minutes torn up and destroyed.

As to the argument founded upon section 7 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70), the law at the date when that statute was passed was, that the duty of maintaining and repairing all public works was enforceable by writ of mandamus, no matter what the injury was or how it was caused. The object of section 7 was, in the case of injury to certain public works by locomotive engines, to relieve from primary responsibility the body whose duty it was to maintain them, and to cast it, in the first instance, upon the owner of the locomotive causing the damage; but the enactment in question does not apply to roads, and the old law still remains in force as regards this case.

The damage in this case was "sudden." The necessity for special legislative provision for cases of "sudden damage" arose from the evanescent character of the Grand Juries. The object of the legislation on the subject is to protect the interests of the public. If this damage had not been treated as "sudden," the County Council could not have taken any immediate step to have it repaired: section 38 of the Grand Jury (Ir.) Act, 1836 (6 & 7 Wm. 4, c. 116), adapted by the Local Government (Adaptation of Irish Enactments) Order, 30th January, 1899. Assuming, for the sake of argument, that damage of this kind is not "sudden damage," the only result would be that the public would have to

(1) [1907] 2 K. B. 480.

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wait till provision was made in the ordinary course for its repair, but the county council's right of action would still be the same, and would accrue at once, because they would immediately become liable to a mandamus to put the road in repair, even though the repairs were covered by a contract: *The King (Westropp) v. Clare County Council* (1). The cause of action arises the moment the plaintiff becomes liable to loss: *Randall v. Raper* (2). The persons who are entitled to sue are those who have received the injury, i.e., in the present case, the ratepayers of the Bailieborough Rural District, and the County Council as their representative. The cause of action accrues with the liability to mandamus; the special damage is the loss to the ratepayers who have to bear the expense of repairing the road.

The plaintiffs' case may be put in the following manner:— They have an interest in the road analogous to that possessed in a private right of way by the owner of the dominant tenement to which it is attached; and just as the latter, if the physical structure of the way was injured by anyone, could, in an action against that person, recover, as damages, the cost of restoring the way to its former condition; so the plaintiffs, having a *quasi* easement in this road, and being bound to keep it in repair, are entitled to recover damages for any loss sustained by them through a wrongful use of the road. In cases of obstructing a right of passage, any special or peculiar loss caused to a person entitled to use it amounts to special damage: *Smith v. Wilson* (3); *Boyd v. Northern Railway Co.* (4). [Madden, J., referred to *Benjamin v. Storr* (5).]

In *Winterbottom v. Lord Derby* (6) the plaintiff failed merely because he was unable to show that he had suffered any substantial damage beyond that suffered by the rest of the public. In *Cattle v. Stockton Waterworks* (7) it was held that a person who contracts to execute works on the lands of another is not entitled to recover consequential damages in respect of an injury to the lands which

(1) [1904] 2 Ir. R. 569.

(2) E. B. & E. 84.

(3) [1903] 2 Ir. R. 45.

(4) [1895] 2 Ir. R. 555.

(5) L. R. 9 C. P. 400.

(6) L. R. 2 Ex. 316.

(7) L. R. 10 Q. B. 453.

causes the work under the contract to become more difficult, and thereby renders the contract less lucrative. The ground of the decision was that the damage was too remote, but in the present case the loss caused to the plaintiffs is direct, not consequential, and arises from their statutory duty to maintain the roads in their district.

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LORD O'BRIEN, L.C.J. :—

June 21.

This case is of considerable public importance. The questions involved, and the circumstances under which the controversy before us arises, are clearly and succinctly set forth in the case which Lord Justice Cherry has stated for our determination.

The question involved, apart from the evidence, is this, Is the owner of a traction-engine which by reason of its excessive weight was calculated to do, and did, substantial and abnormal damage to a public road, adequate for ordinary traffic, civilly liable for the cost of repairs at the suit of the road authority on whom the duty and burden of repair was thrown? The answer to that question should, in my opinion, be in the affirmative. Of course the damage could not be recovered twice over; but, in my opinion, either the County Council or Rural District Council could sue. The County Council is the general road authority, and the District Council is liable, at their hands, for the expenses of repair. It is not necessary, so far as relates to liability for repair, to discriminate between the County Council and the Rural District Council, for both are joined as plaintiffs. The real question, so far as relates to civil proceedings in respect of a nuisance, is whether special and peculiar injury has been sustained so as to establish civil liability. It must be remembered that repaired the road must be, whether the damage was sudden within the meaning of sect. 11 of the Local Government (Ireland) Act, 1898, or not. The liability to repair the road exists, and it is primarily cast upon the County Council as the "road authority"; and the fact that a contract has been entered into with a contractor as to the repair of the road, even if it included such repair as was necessary in this case, does not alter the question. No delegation of authority to a road contractor could secure to the County Council immunity from

K. B. Div. liability. They could not, by means of a contract of the kind referred to, render themselves immune from the discharge of a public duty : see *Westropp's Case* (1).

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What does the case stated by Lord Justice Cherry find? I refer particularly to the 4th, 5th, 6th and 8th paragraphs. They are as follows:—

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4. This road was a public highway, and led to Carrickmacross by a shorter route than the main road.

5. Though capable of bearing ordinary traffic, it was not strong enough to bear the traction-engine.

6. The engine sank into the road at one point, in the Bailieborough district of the county of Cavan, to the depth of about 1 foot, tearing up and destroying about 58 perches of the road in so doing.

8. The road was in good order prior to the accident, and capable of bearing the traffic ordinarily passing over it.

These findings, taken together, in my opinion, establish that the user of the road in question by the defendants amounted to the commission of a public nuisance. The use of an engine of abnormal weight, the using of which was, as the evidence showed, dangerous to a public highway with the normal carrying power of the road in question, and repairable at the expense of a section of the community—as that road was—amounts to a public nuisance, being fraught with very substantial inconvenience, and even risk of injury, to an ordinary careful travelling public. For an authority for this proposition I need not go beyond the case of *Guardians, Armagh Union v. Bell* (2), with the authorities there cited, and also *Chichester Corporation v. Foster* (3); and it will be remembered that the suggestion as to alleged immunity because there was compliance with the statutory requirements under the Locomotive Act, 1865, was exhaustively treated in the former case and negatived.

This brings me to the question whether there was special damage—special and peculiar injury in respect of which either

(1) [1904] 2 Ir. R. 569.

(2) [1900] 2 Ir. R. 371.

(3) [1906] 1 K. B. 167.

of the plaintiff councils could sue. In my opinion special damage existed in this case. When the road was injured in the manner described, a liability was cast upon the County Council, as the road authority, to repair that damage; and a liability was cast upon the Rural District Council to find the money. Either would sustain special damage; but, of course, as I have already stated, damage should not be paid for twice over.

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Formerly, no doubt, the general body of inhabitants, or individuals of whom that casual body was composed, could not sue for civil redress in respect of a public nuisance; but now the inhabitants—the ratepayers—are represented by councils who have a permanent existence and authority, and are of a corporate capacity, and are capable of suing in such capacity, and have the duty and burden of repair cast upon them.

So far I think it is clear that an action in respect of a public nuisance involving special and peculiar liability is maintainable; but does liability otherwise exist? It occurred to me that an actionable wrong in respect of which damages would be recoverable might have been established for the reasons referred to in the judgments in the case of *Foley's Charity Trustees v. Dudley Corporation* (1); see the observations of Cozens-Hardy, M.R., at page 322 of the report; but that case may be distinguishable, as there is, so far as I can find, though the obligation and duty of repair and maintenance of the road are identical, no statutory provision purporting to vest the highway in the road authority in this country. I prefer therefore to rest my judgment on the first ground I have mentioned.

MADDEN, J.:—

The extent to which the use of steam traction-engines on public highways has been legalized is clearly defined by the decision of this Court in *Guardians, Armagh Union v. Bell* (2). There, as in the present case, the traction-engine was, as regards weight and construction, in conformity with the limitations and regulations prescribed by the Act of 1865. It was in that case pointed out that the statutory authorization of a locomotive which

(1) [1910] 1 K. B. 317.

(2) [1900] 2 Ir. R. 371.

K. B. Div. complies with certain provisions, does no more than entitle the owner to use it on a public highway, subject to the Common Law liabilities which were expressly recognized and preserved by the Acts of 1861 and 1865. It does not authorize or legalize its use in such a manner, or in such a place, as to constitute a public or private nuisance. To the same effect is the decision of the King's Bench Division in England in *Chichester Corporation v. Foster* (1).

It is found in the present case that the engine was used on a public highway which was adequate for the purposes of ordinary traffic, but not for the extraordinary user of the road by a locomotive such as that employed by the defendants, with the result that considerable damage was done to the surface of the highway. Upon these findings it is evident that the defendants were guilty of committing a public nuisance for which an indictment would have lain. The question before us is whether the plaintiffs, the road authority, who were put to the expense of repairing the damage to the highway, can recover the amount so expended from the defendants in an action of nuisance.

The character of the proprietary interest of a road authority in the surface of a public highway under their control is clearly defined in the judgments in *Foley's Charity Trustees v. Dudley Corporation* (2). In that case the Court of Appeal in England adopted the language of Farwell, L.J., in *Wednesbury Corporation v. Lodge Holmes Colliery Co.* (3): "At any rate, the surface of the street, and so much of the actual soil of the road as may be necessary for its preservation as a road, are vested in the local authority." The plaintiffs in the present case have, in my opinion, a sufficient proprietary interest in the surface of the highway to enable them to maintain an action of nuisance. A private person whose proprietary rights were injuriously affected by a public nuisance by reason of the injury done to the highway, would undoubtedly have incurred direct substantial and particular damage beyond that suffered by the rest of the public, within the authority of *Benjamin v. Storr* (4) and *Smith v. Wilson* (5). I agree with

(1) [1906] 1 K. B. 167.

(4) L. R. 9 C. P. 400.

(2) [1910] 1 K. B. 317.

(5) [1903] 2 Ir. R. 45.

(3) [1907] 1 K. B. 78.

Mr. Harrison that the right of action accrued at the moment when injury was done to the highway by the commission of the nuisance. In a case like the present, when a plaintiff must single himself out from the general public by proof of individual injury, evidence of actual damage is essential. This is supplied by the plaintiffs by proof of the proceedings which they took under the section of the Local Government Act by which the provisions of the Grand Jury relating to the repair of sudden damage to a public work are now represented. Whether the injury to the highway comes within the meaning of "sudden damage" is, to my mind, immaterial. The plaintiffs were by the commission of this nuisance placed under a direct and special liability to repair the damage done to this highway, and this in itself would amount to direct and particular damage, different from that suffered by the general public. The particular way in which this liability was met seems to me to be material only in so far as it affords a measure of damages.

Under the Grand Jury law no action could have been maintained by or on behalf of the ratepayers, notwithstanding the fact that each ratepayer who had to contribute towards a rate imposed for the special purpose of making good the damage caused by the nuisance would probably be held to have suffered some individual injury, distinct from that of the wayfaring public. The individual ratepayer could not sue, on the principle laid down in the case of *Russell v. Men of Devon* (1); and no action could have been brought on behalf of the ratepayers as a body, inasmuch as there was then in existence no corporate body by which their rights could be enforced. The plaintiffs are such a body; their right to maintain or defend actions on behalf of the general body of ratepayers is clearly settled, and has not been contested. I am of opinion that the action of nuisance is maintainable, and that the measure of damages is the amount expended by the plaintiffs in repairing the injury done to their property.

Solicitor for the plaintiffs: *Francis M'Brien.*

Solicitor for the defendants: *John K. Currie.*

J. C. W.

(1) 2 T. R. 667.

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K. B. Div. THE KING (KINGSTON AND OTHERS) *v.* JUSTICES
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Oct. 31.
OF COUNTY CORK (1).

Justices—Bias—Certiorari.

Justices, in spite of objection, adjudicated on a charge of assault brought by the claimant to an evicted farm against the purchaser of it and two of his servants, the former of whom had been boycotted immediately after a meeting of the local branch of the United Irish League had been held, which meeting had been attended by the Justices in their capacity as members of the League. The defendants were convicted. There was evidence that the boycott was a result of the meeting in question.

Held, that under the circumstances of the case, there was a real likelihood of bias on the part of the Justices, and that they were disqualified from adjudicating on the charge in question.

CERTIORARI.

The prosecutors herein, Richard Kingston, Jeremiah Collins, and Minnie Lorgan, were defendants in a summons issued against them on the 13th May, 1910, on the complaint of Denis Murphy, charging them with having assaulted the complainant at Curraclough, county Cork, on the 6th May

On the 16th June, a summons was issued by Kingston against Murphy for trespassing on Kingston's farm at Curraclough on the 22nd April and the 6th May, and also for besetting the said farm (on which Kingston resided) during the previous three months with a view to compel Kingston to abstain from keeping possession of it. On the same date Minnie Lorgan also issued a summons against Murphy, charging him with threatening her and using abusive language to her at Curraclough on the 6th May, and calling on him to show cause why he should not be bound over to keep the peace.

The cases were all heard together at Shandangan Petty

(1) Before GIBSON, BOYD, and WRIGHT, JJ.

Sessions, on the 21st June, by Messrs. O'Hara, R.M., T. J. Twomey, K. B. Div. Edward Neville, and John Fitzgerald. After hearing evidence, 1910.
the magistrates, by a majority, Mr. O'Hara dissenting, convicted THE KING (KINGSTON) v. Kingston, Collins, and Minnie Lorgan on the charge of assaulting v. Murphy, and imposed fines of 5s. with costs on Kingston and JUSTICES OF COLLINS, and fined Minnie Lorgan 10s. with costs. CORK. Murphy was convicted on the charges of trespass and fined 6d. for each offence; the charge against him of besetting Kingston's farm was dismissed without prejudice, and the charge brought by Minnie Lorgan was dismissed on the merits.

On the 7th July the prosecutors obtained a conditional order for a writ of *certiorari* to quash the convictions against them on the grounds that two magistrates E. Neville and J. Fitzgerald, who heard and determined the case, were interested in the prosecution and adjudication, and were biassed, hostile, partial, and prejudiced against the prosecutors.

The affidavit made by the prosecutor Kingston for the purpose of obtaining the said conditional order contained the following statements:—

That in 1882 Murphy's father was evicted from his farm at Curraclough, which was let to the deponent's father in 1883. That the deponent became entitled to the said farm in the same year under his father's will, and that it had been for the past three vested in him under the provisions of the Irish Land Purchase Acts. That the deponent resided on the said farm, and that Collins and Minnie Lorgan were in his employment.

That Murphy's father had been dead for some years, and that on Murphy returning from America, where he had been for some years, he, in February, 1910, went to reside with a relative who lived on a farm adjoining the deponent's. That, on meeting the deponent shortly afterwards, Murphy said that the deponent should surrender his farm, as he (Murphy) was entitled to it as "heir to his father."

That, on being informed that an application had been made to the Estates Commissioners on Murphy's behalf for re-instatement, the deponent wrote to them, and on the 1st April received a reply stating that the commissioners had considered Murphy's application, and had decided to take no action in the matter.

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That some months previous to the 1st May, 1910, a meeting of the United Irish League was held in Kilmurry, about a mile and a half from deponent's farm; and a few days afterwards a deputation consisting of the Rev. Father O'Connell, C.C., Mr. J. Fitzgerald, J.P., and about twelve other members of the League called on the deponent at Curraclough. That Father O'Connell said they had come in the name of the United Irish League to request the deponent to take compensation for the said farm. That Mr. Fitzgerald said: "If we came before and asked you to give up the farm, we could not offer you compensation. Now you will get compensation, and you will have no excuse," and also said: "If you did not take the farm, the Murphys would be there to-day." That deponent replied that he would only give a conditional answer, and said, "I will give up the lands on the condition that I am pleased with the compensation."

That since his interview with the said deputation no offer of compensation had been made to the deponent, either by the United Irish League or anyone else.

That up to the 1st May the deponent had dealt to a very large extent with two shopkeepers named Jeremiah Regan and Peter Twomey in the village of Crookstown, about three miles distance from Curraclough. That on the 2nd May they both came to the deponent's house, and told him that in consequence of what had taken place at the United Irish League meeting held on the 1st May at Lissarda (a village situated about three miles from Curraclough) they could not continue to deal with him. That since the 1st May the deponent had been rigidly boycotted, and was unable to purchase any necessaries in Cookstown, Lissarda, or nearer than the city of Cork, from which Curraclough is twenty-five miles distant; and that a market had been got for his butter and eggs through the Cork Defence Union.

That Mr. E. Neville, J.P. (who owns and resides on a large farm within a mile of Lissarda), and Mr. J. Fitzgerald, who is a publican, carrying on a general business at Lissarda, and is a Justice of the Peace by virtue of his office as Chairman of the Macroom Rural District Council, are both members of the United Irish League, and had attended the said meeting on the 1st May.

That, when the summons against the prosecutor came on for hearing at the Petty Sessions on the 21st June, the solicitor who appeared on behalf of the deponent objected to Mr. Neville and Mr. Fitzgerald adjudicating on the cases, giving as his reasons that the cases arose out of a dispute as to the deponent's farm, of which Murphy desired to get possession; and that the question of the propriety of the deponent's keeping the farm was discussed at the meeting of the 1st May, when it was decided that active steps should be taken to compel the deponent to surrender the said farm for Murphy.

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That Mr. Neville said that he attended the meeting, but did not remember the case as to the deponent's farm being discussed. That Mr. Fitzgerald said that he had been at a meeting at which it was decided to send a deputation to the deponent, but did not deny the statements made by the deponent's solicitor on the hearing of the said cases.

That Jeremiah Regan was called as a witness by the deponent, and stated that he had dealt with the deponent for years, but discontinued to do so after the 1st May. That he was asked if he attended a meeting of the United Irish League on that date, but declined to answer.

A joint affidavit by Messrs. Neville and Fitzgerald was filed by way of cause against making the conditional order absolute. In it they stated that they were both present at the meeting of the 1st May. They stated that there was "absolutely no truth in the allegations that resolutions were passed in reference to the conduct of Richard Kingston," and "absolutely denied that it was agreed at the said meeting that active steps should be taken to compel Kingston to give up his farm," or that "there were any resolutions proposed or passed that he should be boycotted, or in any way interfered with." Mr. Fitzgerald stated that "beyond approaching Kingston to sell his farm through the Estates Commissioners," he, the deponent, "never took any part, or had any connexion with Kingston in reference to his farm. The deponent also stated that he would be "only too pleased" to deal with Kingston if the latter came to his shop. With reference to Jeremiah Regan's evidence, the deponents stated that the Resident Magistrate did not consider the evidence

K. B. Div. relevant, and told Regan not to answer the question mentioned
 1910. in Kingston's affidavit. Both deponents denied that they were
THE KING in any way biassed or prejudiced against the prosecutors, or any
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In an answering affidavit Kingston adhered to his former statement as to the nature of Regan's and Twomey's conversation with him on the 2nd May, and added that on one occasion since that date his servant had gone to Twomey's shop, and had been refused goods which he desired to purchase on the deponent's behalf. He stated that, at the Petty Sessions, Murphy's solicitor had objected to the question put to Regan, and that the objection was considered by the Bench before it was allowed. The deponent further stated that in the evening, after the Sessions were over, some persons who had been with Murphy at the Courthouse passed along the road near the deponent's house and shouted, "Down with the grabber"; and that since the 1st May police patrols had been sent, both by night and day, to the locality of his farm.

The affidavits of Kingston, and of the Justices who showed cause, contained somewhat conflicting accounts of the evidence which was given at the Petty Sessions. The only point which it is material to state is that, according to Kingston's version, Murphy said he was assaulted when in Kingston's yard. According to the Justices he said the quarrel began when he was on a "public passage" on Kingston's farm, and their account of the evidence made no mention of his having been in Kingston's yard.

The present motion was made on behalf of the prosecutors to have the conditional order made absolute, notwithstanding cause.

W. S. Norwood, for the prosecutors.

G. M'Sweeney, for the Justices.

GIBSON, J. :—

The object of these proceedings is to have certain convictions against the prosecutors, Richard Kingston, Jeremiah Collins, and Minnie Lorgan, quashed.

The two last-named persons are in the employment of Kingston, and summonses for assault were issued against all three on the

complaint of Denis Murphy. The summonses were heard on 21st May, 1910, at Shandangan Petty Sessions, with the result that all three were convicted of assaulting the complainant, Kingston and Collins being each fined 5s. and Minnie Lorgan 10s., with costs in each case. At the same Sessions Denis Murphy was convicted of trespassing on Kingston's farm on two occasions, and was fined 6d. for each offence.

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The ground on which the writ of *certiorari* is sought is that two of the four Justices who heard the case, namely, Edward Neville and John Fitzgerald, both of whom were in favour of convicting the prosecutors, were biassed and prejudiced in their adjudication: and the basis of this objection is that both took part in a meeting of the United Irish League on the 1st May, at Lissarda. Mr. Neville has a large farm close by, and Mr. Fitzgerald is a publican, with a general business, living at Lissarda, and he is J.P. *ex-officio* as Chairman of the Macroom Rural District Council.

The incident which led to the charges against the prosecutors arose out of a dispute as to an evicted farm in the possession of Kingston, and on which he resides. The history of the farm is as follows:—Murphy's father was evicted from it in 1882; and it was let to Kingston's father in the following year; Kingston shortly afterwards succeeded his father, and about three years ago purchased the farm under the provisions of the Land Purchase Acts.

It appears that Murphy, who had been in America for some years, returned to the district early in the present year, and tried to get back the farm. His claim received a good deal of local support. A deputation consisting of Mr. Fitzgerald, a clergyman, and about twelve other members of the United Irish League, went to Kingston, and in the name of the League requested him to give up the farm on receiving compensation, to which request Kingston replied that he would if he were satisfied with the compensation. No compensation was afterwards proposed or tendered. On April 1st, some time afterwards, Kingston received a letter from the Estates Commissioners in which, in reply to an inquiry from him, they stated that they had considered an application of Denis Murphy for re-instatement, and had decided not to take any action in the matter.

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On May 1st, one month after Kingston had received this letter, a meeting of the local branch of the League, at which both Mr. Neville and Mr. Fitzgerald were present, was held at Lissarda near Kingston's farm.

I do not know whether or not it is the practice to keep any record of the proceedings of these meetings; at any rate there is no proof of anything of the kind here; but the Justices deny that any resolutions were passed in reference to the conduct of Kingston. We must draw from subsequent events our inference as to what took place at the meeting in question. The next day two shopkeepers, Regan and Twomey, with whom Kingston had been dealing for a long time, and who carried on business at Crookstown, about three miles from his farm, came to him and told him that, in consequence of what had taken place at the meeting the day before, they were unable to deal with him any longer. This apologetic explanation is significant of the character and effect of the meeting. Since that time Kingston, as he states, has been rigidly boycotted, and has been obliged to purchase all his necessaries at Cork—a distance of about twenty-five miles from his residence—and also to send his produce there for sale. Kingston also swears that, on the evening after his conviction at Petty Sessions, a crowd passed by his premises shouting, "Down with the grabber," and that since that date the police authorities have kept patrols both night and day on the roads in the vicinity of his farm.

It is, as I have said, important in this case to know what took place at the meeting of May 1st, which at present must be collected from inference. When, at the Petty Sessions Court, Kingston's solicitor asked Regan, whom he summoned as a witness, and who stated that he had discontinued dealing after May 1st with Kingston, whether he (Regan) was at the meeting, the solicitor who represented Murphy objected, and the question was disallowed. The ground of objection is not stated. I regret that the objection was allowed—especially in view of the case of bias now made from the presence of the two magistrates at the meeting, followed by such results.

When the cases against the prosecutors came on for hearing in the Petty Sessions Court, Kingston's solicitor objected on his

behalf to the presence of Mr. Neville and Mr. Fitzgerald on the Bench, on the grounds set out in Kingston's affidavit, and requested them to leave it, but neither of them did so. It is unnecessary for me to refer to the evidence which was given on the charges against the prosecutors, except to point out that the assault was said to have taken place in the yard of the farm to which Murphy laid claim, and which Mr. Norwood described him as constantly picketing. It is not our function to decide whether the charges made by Murphy were proved or not, or whether the decision of the magistrates was a just one; our only duty is to decide whether Kingston has proved any reasonable likelihood of bias which would affect the minds of the magistrates. The principle is clear. If there is such likelihood, this Court cannot allow a decision influenced by partiality or prejudice to stand. It must keep the administration of justice pure, and free from just grounds of suspicion. In my opinion, motives of delicacy alone ought to have restrained these two magistrates from taking any part in the decision of the charges against Kingston or his servants; there were two other magistrates present to whom no exception was taken; but, apart from any such feeling, looking at the facts as a whole, I am forced to the conclusion that there was a real likelihood of bias which invalidates the convictions.

It is not necessary to decide that the decisions were the result of actual bias; possibly the magistrates were unconscious of bias; still they persisted in sitting in the face of a valid objection, and, being disqualified, their adjudications must be quashed.

BOYD and WRIGHT, JJ., concurred.

Convictions quashed with ten guineas costs.

Solicitor for the prosecutors: C. W. Ashe.

Solicitor for the Justices: R. Neville.

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 Nov. 7.

HANNAH TERESA GLYNN AND MATTHEW KENNEDY,
 EXECUTORS OF MICHAEL GLYNN, DECEASED,
 APPELLANTS; THE COUNTY COUNCIL OF THE
 COUNTY OF CLARE, RESPONDENTS (1).

Malicious injury—Compensation—Death of applicant—Executors of applicant
—Survival of right—6 & 7 Wm. 4, c. 116, s. 135; 61 & 62 Vict. c. 37,
s. 5.

When an application is made under 6 & 7 Wm. 4, c. 116, s. 135, as amended by the Local Government (Ireland) Act, 1898, s. 5, for compensation for malicious injury to property, and the applicant dies pending the determination of the case in Court, his personal representative is entitled to continue the proceedings, and to recover such compensation for the injury to the property of the deceased applicant as the latter would have been entitled to had he survived.

CASE STATED by the Right Hon. the Lord Chief Justice of Ireland at the Spring Assizes, 1910, for the county of Clare, as follows:—

1. Michael Glynn, merchant and farmer, of Ennis, lodged with the Secretary of the Clare County Council on the 17th day of November, 1908; a claim for £96 compensation for loss sustained by reason of 29 head of cattle, 31 sheep, and 3 horses, his property, having been wantonly and maliciously driven off the lands of Fortfergus in his occupation on the night of the 13th or morning of the 14th November, 1908.

2. The said application came on for hearing before the County Court Judge of Clare, at Kilrush, on the 11th day of January, 1909.

3. On the morning of the said day, and before the Court sat, the applicant, Michael Glynn, died.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

4. Evidence was, however, taken as to the amount of injury sustained by reason of the said cattle-drive, and the County Court Judge conditionally fixed the amount at £28 10s., reserving the point as to whether the claim survived.

5. The application was then adjourned to enable probate to be taken out of the will of the said Michael Glynn, and accordingly proceedings were continued in the names of the said Hannah Teresa Glynn and Matthew Kennedy, the executors named in the said will.

6. When the adjourned case came on for hearing, it was contended by counsel for the Clare County Council that owing to the death of Michael Glynn his application abated, and that his executors were not entitled to continue the proceedings, and the County Court Judge adopted this view and dismissed the application.

7. The executors appealed from that decision ; and said appeal came on for hearing before me at the Spring Assizes for the County of Clare held at Ennis in March, 1910.

8. I decided that the amount of compensation conditionally fixed was correct, but agreed to state this case to take the opinion of the Court whether, when an application is made under 6 & 7 Wm. 4, c. 116, and 61 & 62 Vict. c. 37, Local Government (Ireland) Act, 1898, for compensation for malicious injury to property, and when the applicant dies pending the determination of the case in Court, his personal representative has a right to continue the proceedings and recover compensation for the injury to the property of the applicant in the same manner as the applicant would have been so entitled had he survived.

9. If the answer is in the affirmative, then a decree for £28 10s. with expenses, and all costs when taxed, to issue.

Phelps (Lynch, K.C., with him), for the appellants :—

It is submitted that the executors of the deceased applicant were entitled to continue the proceedings, and to recover the compensation to which the deceased would himself have been entitled had he survived. The personal estate of the deceased was injured by the malicious acts, and thereby became less

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K. B. Div. beneficial to the executors to the extent of £28 10s. If the
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 wrong-doers were known, the executors would, under 4 Edw. 3,
 c. 7, have an action against them for the trespass done to their
 testator, and that "statute, being a remedial law, has always been
 expounded largely." See Williams on Executors (10th ed. 606),
 and judgment of Bramwell, L.J., in *Twycross v. Grant* (1). It
 is immaterial that the compensation is claimed under statute. In
Twycross v. Grant (1) the action was founded on an alleged
 statutory fraud, yet the plaintiff's cause of action was held trans-
 missible to his personal representative, as the value of the personal
 estate was diminished by the wrong. In *Peebles v. Oswaldtwistle*
Urban District Council (2) the plaintiff's cause of action, founded
 upon a statutory duty alleged to exist on the part of the defen-
 dants, was held to survive to the plaintiff's executors. Here there
 was a statutory duty on the part of the County Court Judge to
 award, and on the part of the County Council to pay, compensation
 to the applicant, if entitled thereto; and the right to such compen-
 sation must be transmissible to the executors. The executors come
 within the words in section 135 of 6 & 7 Wm. 4, c. 116, "the
 person or persons so injured." The practice in the case of ordinary
 civil bill appeals is in our favour; there where appellant or
 respondent dies after notice of appeal, but before the hearing, the
 Judge of Assize has jurisdiction to adjourn the appeal to enable
 the personal representative of the deceased to be added to the
 record, and, on this being done, there is jurisdiction to hear and
 determine the appeal: *Canning v. Farren* (3).

M. Comyn, for the respondents.

The executors of the deceased applicant are not entitled to com-
 pensation, the right to which is not dependent on the common law
 or natural justice, but on a special code, within the provisions of
 which the executors cannot bring themselves. They are not "the
 person or persons so injured" within section 135. Where statutory
 compensation is intended to be transmissible to the personal
 representatives of the injured party, it is always so provided by

(1) 4 C. P. D. 40, at p. 45.

(2) [1896] 2 Q. B. 159.

(3) [1907] 2 I. R. 486.

the statute. The compensation for murder or maiming, provided for by section 1 of 9 Wm. 3, c. 9, was made payable to the widow and children of the person murdered, or of the person maimed if dying before recovery from the maiming, and it was provided that such compensation should not be assets of the deceased, but the right of action given by section 2 of 23 & 24 Geo. 3, c. 20, to recover damages sustained by offences under the Act against the magistrates of a county of a town or city, or against the inhabitants of a parish, as the case might be, was expressly extended to the executors or administrators of the person or persons injured. So also by section 4 of 11 & 12 Vict. c. 69, the right of persons having sustained damage for which they might have had a remedy under the Acts thereby repealed, and who had commenced an action, to proceed to recover damages and costs under the said repealing Act, was extended to the executors and administrators of such persons.

No such provision in favour of personal representatives is to be found in section 135 of 6 & 7 Wm. 4, c. 116. The equitable construction of the statute 4 Edw. 3, c. 7, cannot be extended to such a case as the present. This is not a proceeding in the nature of an action on the case for a "debt" or "duty": see *Sollers v. Lawrence* (1); *Hambly v. Trott* (2). This is a claim for an unliquidated amount, in the nature of damages in satisfaction of the injury done, and such a claim cannot survive: *Sir Henry Sherrington's Case* cited by Lord Mansfield in *Hambly v. Trott* (2); *Finlay v. Chirney* (3); *Davoren v. Wootton* (4). In *Martin v. Martin* (5) it was held that money presented by a grand jury as compensation to the widow and personal representative of a peace officer murdered in the discharge of his duty was not assets of the deceased. *Darlington v. Roscoe* (6) is not an authority against me; no doubt it was there held that the right of compensation of a dependant of a deceased workman, whose death was caused by an accident arising out of and in the course of his employment, survived to the personal representative of the dependant, but under

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(1) Willes' Rep. 413, at p. 421.

(2) 1 Cowper, 371, at p. 375.

(3) 20 Q. B. D. 494.

(4) [1900] 1 I. R. 273.

(5) 23 L. R. I. 413.

(6) [1907] 1 K. B. 219.

K. B. Div. the Workmen's Compensation Act, 1897, the dependant has a
 1910. vested statutory right to compensation, the amount of which is
 GLYNN assessed by the Act itself. There is no analogy between such
 v. a vested right and a claim for an unascertained amount which
 CLARE a vested right and a claim for an unascertained amount which
 Co. COUNCIL. must be established by proof, such as the present. The personal
 nature of the right to compensation is shown by the *Commercial
 Plate Glass Co. v. Lord Mayor of Belfast* (1), where the Insurance
 Company in whose office the property injured was insured, and
 which alone suffered by the malicious injury, was held disentitled
 to compensation. The loss to the estate cannot be the test of the
 right to recover compensation; in *Jones v. Belfast Corporation* (2)
 compensation was awarded to the owner of a house which was
 destroyed by fire, although the loss was covered by a policy of
 insurance, and the amount thereof had been actually paid to the
 applicant. The restricted meaning of "person" in section 137
 of 6 & 7 Wm. 4, c. 116, is shown by *Boyers & Co. v. Corporation
 of Dublin* (3), where it was held that a trade-name is not a
 "person" within the meaning of that section.

[He also referred to *Re Tobin* (Res. Cases 1860-4, 2).]

Phelps in reply.

Nov. 7.

THE LORD CHANCELLOR:—

This case, reserved by the Lord Chief Justice from the last Spring Assizes for the County Clare, raises an interesting question as to the law and procedure applicable in the case of criminal injuries.

It appears that on the 13th November, 1908, certain cattle, sheep, and horses, the property of Michael Glynn, were wantonly and maliciously driven off his lands, by which they were injured. He duly made, pursuant to the 135th section of the Grand Jury Act, a claim for compensation for his loss against the County Council.

The case came on for hearing before the County Court Judge on the 11th January, 1909, and on the morning of the same day, and before the case was opened, Michael Glynn died. The point

(1) 27 I. L. T. R. 116. (2) 32 I. L. T. R. 32. (3) 2 N. I. J. 102.

was raised that the claim came to an end by reason of the death; and the damages were provisionally ascertained at the sum of £28 10s., reserving the question whether the claim survived, for the determination of which the case was adjourned.

Probate was taken out of the will of Michael Glynn by his executors, and the proceedings were continued in their names. When the case came on for hearing, the County Council contended that the executors were not entitled to continue the proceedings, and the County Court Judge acted on this view, and dismissed the application.

An appeal was taken to the Assizes, and the Lord Chief Justice decided that the amount of compensation conditionally fixed was correct, but agreed to state a case to take the opinion of the Court whether, where an application is made under 6 & 7 Wm. 4, c. 116, and the Local Government Act, 1898, for compensation for malicious injury to property, and where the applicant dies pending the determination of the case in Court, his personal representative has a right to continue the proceedings and recover compensation for injury to the property of the deceased in the same manner as the applicant would have been entitled. If the answer is in the affirmative, a decree for £28, with expenses and costs, when taxed, is to issue.

The 135th section of the Grand Jury Act enacts that in all cases of maliciously or wantonly killing, maiming, houghing, or injuring any horse, mule, ass, or swine, or any horned cattle or sheep, belonging to any person, where an application for compensation in respect thereof is made, the County Court may, on the consideration of the said matter, either refuse such application altogether, or make a decree for such sum or sums of money as the person or persons so injured ought to receive for such injury or damage, to be levied off the county at large or other the area directed.

The 137th section contains a proviso creating a condition precedent to the application, that the applicant shall within three days after the commission of the injury, unless prevented by illness or other sufficient cause, make an information in the manner and containing the particulars mentioned in the section. It is not disputed that this condition precedent was complied with by

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K. B. Div. the applicant, and that on the day of his death his right to apply
 1910 was complete, and that all that was left was that the Court should
 GLYNN hear the evidence and decide on the case, and ascertain the damages
 CLARE if any.

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This was a new right and remedy given to the party injured in respect of his injured property, and when the conditions attaching to it were performed, an obligation and duty to make compensation was created.

The question is whether, after the death of the person injured, his personal representatives can maintain an action founded on that to recover damages for the injury to the personal property of the deceased.

It was contended for the County Council that the maxim *actio personalis moritur cum persona* applied to the case. But since the 4 Edw. 3, c. 7, executors and administrators can maintain an action for damages to goods of their testator or intestate done in his lifetime, whereby the personal estate has become less beneficial to them in their character: see 1 Wms. on Exors., 7th ed., p. 790.

It is said this enactment has no application to this penal procedure, founded on malice to the deceased, brought against a body which did not itself commit the wrong. But the Legislature has named that body as the persons to be sued as representing the wrong-doers, and given the persons injured the right to prosecute it, and imposed upon the public body the duty to answer in respect of it.

Several authorities were cited which seem to me to support the view of the applicants. In *Twycross v. Grant* (1) the promoters of a public company, in breach of the 38th section of the Companies Act, 1867, issued a prospectus which did not disclose certain contracts entered into by them, and Twycross on the faith of the prospectus applied for and was allotted shares which proved valueless, and thereby he sustained injury. Pending the proceedings Twycross died, and his personal representative applied for leave to continue the action. The Court of Appeal held that he was entitled to do so. The Court in that case relied mainly upon the 4 Edw. 3,

(1) 4 C. P. Div. 40.

c. 7, and Bramwell, L.J., pointed out in his judgment that there was a wide distinction between the liability of an executor to be sued and his right to sue. K. B. Div.
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The case of *Peebles v. Oswaldtwistle Urban Council* (1), also in the Court of Appeal, is still more apposite. There a manufacturer commenced an action for a mandamus to compel the defendants to perform a statutory duty imposed on them under the Public Health Act, 1876, to make a sewer to his factory. The plaintiff died pending the action. Lord Esher says:—"If a duty was owed by the defendants to the deceased with regard to his property, the non-performance of that duty gave rise to a cause of action that survived to his executors." It was held that the executors could continue the action, though the duty arose under a statute, and not under a contract. GLYNN
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Mr. Comyn very properly referred to a case much against him of *Darlington v. Roscoe* (2), where it was held that, where the sole dependant of a deceased workman, whose death was caused by an accident arising out of and in the course of his employment, made a claim against the employers for compensation under the Workmen's Compensation Act, 1897, but died before award made, the legal personal representative could prosecute the claim. The case in 4 C. P. Div. was referred to as an authority.

Farwell, L.J., says the maxim *actio personalis moritur cum persona* has no application. The claim is based not upon either tort or contract, but on a duty created by the statute. There the deceased had made the claim before death, but in the case of *United Collieries, Limited, v. Simpson* (3) the House of Lords went further, and held the same rule applied, though no claim had been made, and they dissented from the Irish case in this Court of *O'Donovan v. Cameron* (4), where no claim had been made before death. The ground of that decision of the majority of the Law Lords was that the statute created a liability and a right which vested at the death of the workman and were transmissible. So here, I think, though there was no wrong done by the County

(1) [1896] 2 Q. B. 159.

(2) [1907] 1 K. B. 219.

(3) [1909] A. C. 383.

(4) [1901] 2 I. R. 633.

K. B. Div. Council, the right to proceed vested at the death and was trans-
 1910. missible. As regards the application of the maxim *actio personalis*
 GLYNN *moritur cum persona*, this is not an action *in personam*. There was
 v. no tort committed by the County Council. It is only brought
 CLARE before the Court to represent a statutory liability, and liability
 Co. COUNCIL. and right are correlative. If I were at liberty to refer to the
 The Lord policy of the Act, I think we are right in holding that the decision
 Chancellor. in favour of the application carries out that policy, but I am
 content to rest my judgment on the statutory provision itself.

In my opinion we should answer the question reserved for us
 in the affirmative.

HOLMES, L.J. :—

The only matter involved in this appeal is a pure question
 of law, which presents to my mind no difficulty.

Michael Glynn, alleging that cattle, sheep, and horses belonging
 to him had been maliciously driven off his lands on the night
 of the 13th November, 1908, and that the animals had thereby
 been considerably depreciated in value, lodged on the 17th of that
 month, with the County Council of Clare, a claim for compensation
 for the loss thus sustained pursuant to the provisions of
 6 & 7 Wm. 4, c. 116, and 61 & 62 Vict. c. 37. All the preliminary
 steps prescribed by these statutes were duly taken by Glynn;
 and the claim was entered for hearing before the County Court
 Judge, on the 11th June, 1909, and would have been heard on
 that day, if the claimant had not died immediately before the
 Court sat. The Judge thereupon adjourned the hearing to enable
 the will of the deceased to be proved by his executors, who,
 having obtained probate, continued the proceedings. In this state
 of things, the case came again before the Judge, who, while
 holding that the animals had been maliciously driven off the lands
 of the deceased, causing him a pecuniary loss of £28 10s., decided
 that the right of compensation terminated with Glynn's death,
 and that the claim could not be revived or continued by his
 executors. The question reserved for this Court by the Judge
 of Assize on the hearing of an appeal by the executors from the
 dismissal in the County Court, is whether the common law rule

as to torts—*actio personalis moritur cum persona*—applies to K. B. Div.
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Every lawyer knows the extent to which this rule has been altered by 4 Edw. 3, c. 7, and subsequent amending Acts, which, being remedial in their nature, have been construed very liberally. GLYNN
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Bramwell, L.J., says in *Twycross v. Grant* (1) that these statutes Holmes, L.J.
“have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature.” I have no reason to think that this statement is too comprehensive; but even if it were, there can I think be no doubt that the common law rule does not apply to wrongs by which the value of the testator's personal estate was diminished. In the present case it must be and has been admitted that if the person or persons who drove the cattle could be identified, the executors could have recovered judgment against him or them for the sum of £28 10s. It seems to me to follow necessarily that the claim against the County Council also survives and can be enforced by the executors. To hold otherwise would be illogical in the highest degree.

What have the statutes of 1836 and 1898 done? They have given an additional right to a person the value of whose personal property has been depreciated by a trespass, provided the trespass was a crime for which the person who committed it could have been punished on indictment under the Malicious Damage Act, 1861. In such a case he is given a right to recover compensation from the County Council for the pecuniary loss sustained by him; and why this right should die with him, while the right to recover the same sum from the actual trespasser would survive, I cannot understand. The fact that the County Council is an innocent body unconnected with the trespass is immaterial, if the statutes gave against them a right fully vested at the time of the death.

For these reasons, I answer the question reserved by the Lord Chief Justice in the affirmative; and I may add that I would have come to the same conclusion without the assistance of *Twycross v. Grant* (1), *Peebles v. Oswaldtwistle Urban District*

(1) 4 C. P. Div. 40, at p. 45.

1910. *Council* (1), and the workmen's compensation cases that have
 GLYNN — been referred to; but even if I had entertained any doubt,
 v. these authorities would have removed it.
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CHERRY, L.J.:—

Holmes, L.J.

It is not necessary, in order to answer the question submitted to us by the Lord Chief Justice, that we should enter into any prolonged examination of the series of Acts of Parliament, beginning with the statute 7 Wm. 3, c. 21, of the Irish Parliament, and dealing with the subject of malicious injuries, which were referred to by Mr. Comyn. It is sufficient, in my opinion, to consider the terms of the Act at present in force, *i.e.* 6 & 7 Wm. 4, c. 116, under the 135th section of which, as amended by the 5th section of the Local Government Act, 1898, the claim in the present case is made. That section provides, in language of quite unnecessary verbosity, that in all cases of maliciously or wantonly injuring certain classes of property "any person or persons injured by any such offence may apply" (after service of notice and compliance with certain other formalities as provided by the section) "for compensation for any loss or damage sustained thereby." The application formerly made to the grand jury is now under the 5th section of the Local Government Act, 1898, made to the County Court, the County Council, the District Council, and any ratepayer being entitled to appear and be heard by the County Court Judge before any compensation is awarded. Under the 135th section of 6 & 7 Wm. 4, the grand jury were directed to consider the matter, and either "disallow such application altogether, or present such sum or sums of money as the person or persons so injured ought to receive for such injury or damage."

Now, it will be observed that the section, throughout, speaks of compensation for loss sustained by a person injured, and limits the amount to be paid to him to the amount of the injury he has sustained. Anything in the nature of punitive damages would be quite outside the scope of the section. It is compensation, and compensation alone, to which the injured person is entitled. There is nothing in the section, as far as I can see, to suggest

that its object was to punish the ratepayers of a particular district for an outrage supposed to have been committed with their connivance or sympathy.

It will be observed also that there was, under the earlier procedure before the grand jury, nothing in the nature of litigation. There was no action or suit whatsoever. The party injured merely applied to the Grand Jury for compensation, and was awarded by them such sum as, in their opinion, was sufficient to compensate him *for the loss he had sustained*. Under the present system the proceedings certainly resemble an action more than they formerly did, for two parties, in addition to the claimant, are entitled to appear and be heard; but the statute does not provide that either the County Council or the District Council is to be named as a defendant, nor does it even refer to them as "parties" to a suit.

These considerations, to my mind, completely dispose of the argument of Mr. Comyn, based upon the maxim, *actio personalis moritur cum persona*. This maxim has no application, and can have no application, to the present claim, for several reasons. In the first place, there is no *actio*. In the second, even if one could describe the procedure to assess the compensation as an *actio*, it is clearly not an *actio personalis*. The claim is based, not an injury to the person, but on an injury to property. "Without attempting," says Fitz Gibbon, L.J., in *Davoren v. Wooton* (1), "to give an exhaustive definition of the class of cases to which the rule *actio personalis moritur cum persona* does not apply, the following tests may be suggested. If the assets of a deceased person have been specifically diminished by the cause of action, his personal representatives may, after his death, institute or continue an action to recoup them." Can it be doubted that the assets of Michael Glynn were diminished by the injury done to his cattle in the present case? or that his personal representatives could proceed by action against the wrong-doers, if they knew who they were, to recover damages for the injury to his property sustained by him?

But, apart from the maxim, which, as Lord Shaw remarks (2),

(1) [1900] 1 I. R., at pp. 273, 282.

(2) *United Collieries, Limited, v. Simpson*, [1909] A. C., at p. 396.

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"is of doubtful origin, has produced confusion rather than guidance in specific cases, and is used rather to dress up a conclusion already formed than as a safe guide towards a conclusion," Mr. Comyn argues that "person or persons injured" in the section means "the owners of the property injured at the time of the injury," and that it is they, and they alone, who can apply for compensation. In the present case, however, the owner of the property at the time of the injury *has* applied. All the necessary notices were served on his behalf, and the only question for us to decide is whether his death before the amount of compensation was assessed by the County Court Judge destroys the right to compensation which he enjoyed, admittedly, up to the moment of his death.

Upon this question we derive considerable assistance from the decisions under the Workmen's Compensation Acts. Claims under those Acts are in many respects analogous to claims for malicious injuries. They are claims for compensation merely, not for damages. They are made against parties who are in no way responsible (in the majority of cases, at all events) for the injuries sustained, and they are made by a proceeding which cannot be properly termed an action, and so are free from certain technical rules which might otherwise somewhat restrict them. Now the very question which arises here as to claims for compensation for malicious injuries has been decided by the Court of Appeal in England in reference to a claim under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). That Act provides (section 1, sub-section 1) that "If in any employment to which this Act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

Section 7 of the same Act provides that "Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other persons to whom compensation is payable." The last section, though it expressly enables the personal representative of a workman to make or continue a claim, says nothing as to the death of a dependant of a workman. Notwithstanding this omission, it has been held by the Court of Appeal in England

that where the sole dependant of a deceased workman (whose death was caused by an accident arising out of and in the course of his employment) made a claim against his employers for compensation under that Act, but died before any award was made in respect of that claim, the right to compensation survived and passed to the legal personal representative of the deceased dependant (1).

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This decision appears to me to be exactly in point, and to govern this case. The House of Lords have gone even further, for they have decided, under the Act of 1906, that where the dependant died without having made any claim, the personal representative of such dependant might recover the compensation in a proceeding initiated after the death of the dependant: *United Collieries, Ltd., v. Simpson* (2). Whether that decision would apply in the case of a claim founded upon a malicious injury, we need not now consider.

Mr. Comyn very candidly admitted that *Darlington v. Roscoe* (1) was an authority against his contention, but he endeavoured to distinguish it upon the ground that the claim in respect of malicious injuries is founded upon a tort, whereas the claim under the Workmen's Compensation Act arises from an accident. But once it is shown, as I think it has been, that the maxim *actio personalis moritur cum persona* has no application to the case, it makes no difference whether the claim is founded on tort or not. The claim may be founded upon tort, but it is not the tort of the persons from whom the compensation is claimed.

Apart from these decisions under the Workmen's Compensation Acts, I think the matter is clear on principle. It is a settled rule that wherever a statutory duty in favour of a particular person is imposed, the right to the performance of that duty survives, in the event of his death, to his personal representatives. That has been clearly laid down by Lord Esher and A. L. Smith, L.J., in the case of *Peebles v. The Oswalttwistle Urban District Council* (3). There an action was commenced for a mandamus to compel the

(1) *Darlington v. Roscoe*, [1907] 1 K. B. 219.

(2) [1909] A. C. 383.

(3) [1896] 2 Q. B. 159.

K. B. Div. council to make a sewer. The plaintiff died pending the proceedings, and it was held that inasmuch as the alleged cause of action
 1910. _____
 GLYNN _____
 v. _____
 CLARE _____
 Co. COUNCIL, _____
 Cherry, L.J. _____

arose out of a statutory duty to the deceased it survived to his executors, who were entitled to be substituted as plaintiffs. In the case of malicious injury to property it appears to me that a statutory duty to assess the compensation was, by the 6 & 7 Wm. 4, clearly cast upon the Grand Jury, and that that duty is now imposed upon the County Court. The death of the claimant does not relieve the Court from the performance of it.

There remains one other argument put forward on behalf of the County Council to be dealt with, namely, that as to the formal difficulty as to the parties. Mr. Comyn urged that inasmuch as there was no section of any Act of Parliament, or any rule providing for the continuance of proceedings in these claims in the name of the personal representatives, there was no power to revive them in case of the death of the claimant. The decision in the analogous case of civil bill appeals by the King's Bench Division in *Canning v. Farren* (1) is, however, a complete answer to this contention.

Formerly where the appellant or respondent in a civil bill appeal died after service of notice of appeal, but before the hearing, there being no statute or rule providing for the continuance of the proceedings, many Judges held that the proceedings upon the appeal entirely abated, but it has been decided by the full Court of King's Bench that that is not so, that the personal representatives of the deceased party may be substituted for him, and that there is then jurisdiction to hear and determine the appeal. The same principle, I think, applies to the present case.

For these reasons I agree with my colleagues that the question submitted to the Court should be answered in the affirmative.

Solicitor for the appellants : *Michael J. Macnamara.*

Solicitor for the respondents : *John F. Cullinan.*

R. ST. J. C.

(1) [1907] 2 I. R. 486.

THE KING (MOORE) *v.* JUSTICES OF COUNTY
DUBLIN (1).

K. B. Div.
1910.

July 20, 27.

Petty Sessions practice—Warrants in rate cases—Execution of—Addressing to constabulary or other person—Duty and discretion of Justices—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 25 (2).

Section 25, sub-section 2, of the Petty Sessions (Ireland) Act, 1851, which provides that Petty Sessions warrants in cases other than offence cases "shall be addressed either to the District Inspector or Head Constable of constabulary . . . or to such other person or persons (not being the complainant or a party interested) as the Justices issuing the same shall see fit)," imposes no obligation on a complainant to nominate to the Justices some suitable person other than the constabulary, to whom the warrant should be addressed and issued for execution.

The sub-section imposes a statutory obligation on the magistrates to address such warrants either to the constabulary, or, in their discretion, to some other person (not being the complainant or a party interested), and if they refuse to perform such duty, a mandamus will issue to compel them.

The complainant may nominate to the Justices a suitable person as the person to whom the warrant ought to be addressed, but the Justices may, in their discretion, refuse or reject any such person so nominated.

MOTION to make absolute a conditional order for mandamus, directing the Justices to address and issue certain warrants of distress to the District Inspector or Head Constable of constabulary.

Patrick Moore, of Portumna, Clonee, in the County of Dublin, a collector of poor rate in the employment of the Dublin County Council, issued a summons against one Mary Grant, an occupier of a rateable holding, situate in the town of Baldoy, to recover a sum of 15s. 7d., being the first and second moieties of the poor rate duly apportioned in respect of her holding aforesaid, for the year ending 31st March, 1910, which rate the said collector was lawfully authorized to collect by virtue of a warrant duly issued to him by the said County Council on the 15th April, 1909. The summons came on for hearing before the Justices sitting

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, J.

K. B. Div. at Raheny Petty Sessions, on the 7th of March, 1910, when
 1910. Mr. Charles V. Russell, solicitor (of the firm of W. J. Shannon),
 THE KING appeared on behalf of the complainant. The defendant did not
 (MOORE) appear. The magistrates upon the said hearing made an order
 v. JUSTICES OF for payment of the said sum of 15s. 7d. and 2s. costs. The
 Co. DUBLIN. magistrates made like orders in several other cases. Mr. Russell
 applied to the Justices in each case, to issue a warrant to levy
 the amount by distress, and to address the same to the District
 Inspector or Head Constable of constabulary in compliance with
 section 25 (2) of the Petty Sessions (Ireland) Act, 1851.

The District Inspector of constabulary (Mr. H. Litton-Cary)
 appeared, and opposed the application that the warrant should be
 addressed to the constabulary for execution, and stated that the
 police had sufficient work to do outside of this.

Mr. Russell referred to *The Queen (Jones) v. Barry* (1), and
 argued that it had been decided in that case that section 152
 of the Grand Jury Act, which directed that warrants should issue
 to the collector of county cess, was inconsistent with the Petty
 Sessions Act, and had therefore been repealed by the latter Act.

The District Inspector then applied to the Justices to put
 a stay upon the issue of the warrant for fourteen days, to
 enable him to get instructions from his authorities. The magis-
 trates granted this application. The further argument of the
 case took place on the 21st March, when Mr. Ball, solicitor (of
 the Chief Crown solicitor's office), appeared on behalf of the police.
 Mr. Russell, on behalf of the complainant, renewed his application
 that the Justices should issue the warrant for execution to the
 constabulary, or to some other person nominated by the Justices.
 The magistrates declined to grant this application, and pointed
 out that rate-collectors had power under their own warrants
 without coming to the Justices at all, and the rate-collector
 in this case had not exercised it. Mr. Ball argued that *The*
Queen (Jones) v. Barry (1) was not an authority for arbitrarily
 addressing warrants in rate cases to the police; that the Petty
 Sessions Act, section 25, gave a discretion to the Justices, and he
 appealed to the Bench not to exercise this discretion by imposing
 a duty on the police for which the rate-collector was paid, as the

police had no means of efficiently discharging such duty, and *K. B. Div.* further it would bring them into unnecessary conflict with the public in civil cases. The Justices offered to issue the warrant to any suitable person the complainant might nominate, and suggested the summons-server; and they also offered to issue the warrant in blank. The complainant's solicitor refused to adopt either of these courses, and contended that the Justices must address the warrant to the police as a matter of course, unless some other suitable person was nominated by the complainant, but that there was no obligation on the complainant to nominate anyone. The magistrates refused to address and issue the warrant to anyone unless the complainant nominated some suitable person.

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On the 18th May, 1910, counsel on behalf of the complainant obtained a conditional order for mandamus directed to the above-named Justices, commanding them to address and issue the warrant for execution to the District Inspector or Head Constable of constabulary, or to such other person or persons (not being the complainant or a party interested) as the Justices issuing the same shall see fit.

Clancy, K.C., and *Timothy Sullivan*, for the appellant, referred to section 25 (2) of the Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93), and cited *The Queen (Jones) v. Barry* (1), and *The Queen (Nugent) v. Justices of Tyrone* (2).

The Solicitor-General (C. A. O'Connor, K.C.), and *John Linehan*, for the Crown, admitted there was no duty on the complainant to nominate; but there should be some one named to the magistrates to enable them to exercise their discretion. Mandamus should not go, as the complainant had refused to accept a warrant addressed to the summons-server, or any warrant except one addressed to the constabulary.

LORD O'BRIEN, L.C.J.:—

An application has been made in this case for a mandamus to compel the magistrates mentioned in the title hereof to issue warrants for the execution of certain orders made by them for the payment of poor rate. The question involved is a very

(1) 23 I. L. T. R. 28.

(2) 43 I. L. T. R. 261.

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narrow one. It arose in this way: certain magistrates who presided at the Raheny Petty Sessions in the county of Dublin, made orders, at the instance of a poor rate collector, for the payment of poor rate; and a discussion arose as to who was the person to whom the warrants for execution should be addressed. The 25th section of the Petty Sessions Act was referred to. As regards the warrants with which we are dealing, that section provided that they should be addressed to the District Inspector or Head Constable of Constabulary, or to such other person or persons (not being the complainant or party interested) as the Justices issuing same should see fit.

In the argument before us it was contended that the applicant for the warrants should name persons other than the constabulary to whom the warrant for execution might be entrusted, so as to afford the magistrates an opportunity of exercising their discretion. I am of opinion that it is not incumbent on the applicant for the warrant so to do. The matter is for the magistrates exclusively. The responsibility rests with them, though, no doubt, the applicant for the warrant might make an assistful suggestion. If the applicant for the warrant named a person to whom, in his opinion, the warrant might be addressed, the magistrates could nevertheless reject the person so named; and if they did not in the exercise of their discretion name the District Inspector or Head Constable, they might name a person to execute the warrant other than the person named or suggested by the applicant. As a practical matter, if I were a magistrate, and knew of no person I considered fit to be entrusted with the execution of the warrant, or if the name of no such person was submitted to me, I would have no difficulty in naming the District Inspector or Head Constable. But even if I did know of a person fit to be entrusted with the execution of the warrant, I would still have a discretion, as to whether I would appoint the police or that person.

In the case before us the magistrates have not exercised the discretion reposed in them by the statute. It is mandatory on them—there is a statutory obligation on them—to do so. They must name either the District Inspector or Head Constable, or such other person as they think fit, other than the complainant or person interested. They have not done so. The *mandamus* asked for must be, accordingly, granted.

GIBSON, J. :—

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This case raises a serious question as to the administration and execution of law. In summary jurisdiction cases, for a long period, the duty of executing warrants has been entrusted to the police. This is so under the Fines Act, 1851. The Petty Sessions Act, section 25, in offence cases (many of which are hardly distinguishable from torts, and are without any element of breach of the peace), requires warrants to be addressed to the District Inspector or Head Constable. In other cases, warrants are to be addressed to them, or to such other person or persons (not being the complainant or a party interested), as the Justices issuing the same shall see fit. The point now raised on behalf of the constabulary is that henceforth they should be relieved from this duty, save in special cases, and that the applicant is bound to propose a person to execute this warrant. Apparently the police representative was allowed by the Justices a *locus standi* to object and argue the case. In my opinion he had no such right. If, in each case, the issue of a warrant for a small sum is to be preceded by an argument between the applicant and the police, such controversy would not tend to facilitate or ensure the efficacious execution of the warrant subsequently.

The gravity of the proposed change of practice is obvious. Parliament manifestly considered that warrants to enforce payment of small sums—often a few shillings—should be executed without expense by the police—independent, neutral officers, paid by the State, though warrants, in the discretion of the Justices, may be addressed to others, not being the complainant or persons interested. If this onus of naming a suitable person rests on the applicant, it is clear (1) that the execution of the warrant might be indefinitely delayed, as the applicant might be unable to find or suggest such person, or the Justices might decline to approve of the person selected; (2) that such course would be attended with considerable expense, as the persons nominated (who cannot be the applicant) would usually require payment, which, in many cases, particularly in disturbed districts, would be out of all proportion to the debt, so that abandonment of the sum recovered would be preferable to attempts at enforcement. The fact that the complainant is

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prohibited from executing, and that the Justices are to name or approve of the person to execute—a restriction not applicable to a special bailiff in the County Court—indicates that one of the reasons for the legislation was the protection of humble litigants, and the avoidance of possible breaches of the peace.

In the present case the Justices, yielding to the police objection, required the applicant to nominate a person other than the police, or to accept a warrant in blank. This latter alternative was plainly illegal; but the police representative did not bring this under the Justices' notice. The question before us is, therefore, confined to the first alternative.

The issuing of a warrant is a ministerial act. The police officer to whom it is addressed is compelled by law, whether he objects or not, to execute it. On the other hand, no other person can be compelled to execute, unless he consents to accept the duty, for which he would require payment. Where the applicant desires or consents that the police should not execute, there would be no difficulty; but is the obligation thrown on the applicant against his will of procuring a person to execute? The statute does not say so, and the practice hitherto has been the other way. The change now proposed would go far to paralyze summary jurisdiction in Ireland. What is sought is to lay down a general rule that in future the police either generally, or in certain special undefined classes of cases, ought not primarily, or *prima facie*, to be called on to enforce warrants; and the rule cannot be restricted to any particular class or classes of cases. If it applied in the County Dublin, where constabulary duties are comparatively light, it might be extended over the whole of Ireland. There was, in the present case, no evidence of any special circumstances showing that the duty would interfere with the discharge of ordinary police duties; and the magistrates (who have made no affidavit, and of whose decision and its grounds there is no record or note) apparently acted on the broad principle that generally, or, at least in rate cases, *prima facie*, warrants ought not to be addressed to the police—a principle or rule which would be erroneous, even if, in the exercise of discretion in special instances, the Justices were at liberty to require the applicant to nominate some one else. It

would appear less objectionable to employ the police to enforce public debts than private demands; it would be obviously for the public interest that such debts should be collected by independent officers, without expense or danger of loss. The disability of the complainant himself to execute supplies a strong argument. In offering to issue the warrant in blank, the magistrates exhibited a startling misconception or disregard of their duty, which the police representative for some reason did not deem it necessary to correct. One of the grounds relied on before the Justices was the power of distress. But this same power exists in most penal cases, and the existence of such power cannot affect the right of the party to a warrant, or determine the choice of the persons to execute it. If the Justices decided that, wherever there was such power, the police should not *prima facie* be named in the warrant, they acted on a mistaken principle, and did not properly execute jurisdiction.

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I am of opinion that, for the above reasons, the magistrates declined jurisdiction which (as already observed) was ministerial in character. They sought to impose on the applicant, against his will, an obligation which the statute does not create; and, in any case, they acted on an erroneous principle, namely, that *prima facie* the police should be excused, which seems opposed to the manifest policy and language of the statute. It is to be regretted that they did not place on record in some ascertainable form the reasons of their action, especially in view of the illegal alternative they proposed. Mandamus, of course, is applicable, even where there is jurisdiction, if Justices, in refusing, go on a wrong principle.

It was faintly argued that mandamus should be refused, because the applicant declined to take any warrant but one addressed to the police. The answer is he did not; he only objected to nominate. The conditional order gives the two statutory alternatives.

Solicitor for the complainant: *W. J. Shannon.*

Solicitor for the Crown: *Malachy Kelly.*

J. M.

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Nov. 3.

HEENEY v. ADDY AND ANOTHER (1).

(1909. No. 7470.)

Negotiable instrument—Promissory note—Validity of—Sum stated in figures in margin, but not stated in body of note—Bills of Exchange Act, 1882, s. 83.

A promissory note, bearing an embossed 6d. stamp, with the figures £50 in the margin, but no sum stated in the body of the note, held to be, as between the original parties to it, a valid and complete note for £50, there being evidence to show that they had so regarded it, and a finding by the Judge at the trial without a jury, that it was given in payment of a debt of £50.

NEW TRIAL MOTION.

The action, which was tried by Wright, J., without a jury, during the Trinity Sittings, 1910, was brought by Robert J. Heeney against Edward J. Addy and John Addy, to recover £45 1s. 2d., of which £43 was for principal, and £2 1s. 2d. for interest, due on foot of a promissory note.

The note, which was on paper bearing an embossed 6d. stamp, was in the following form :—

£50

June 30th 1908



Four months after date we jointly
& severally promise to pay

	Beamond { Robert J. Heeney
John Addy	Drogheda { Robert P. Heeney

Footstown Ardee

Edward F. Addy

(1) Before GIBSON and BOYD, JJ.

The note was in the same handwriting as the signature, Robert J. Heeney, and the addresses were written in red ink and placed as shown above. The note was endorsed as follows:—

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ADDY.

Robert J. Heeney

Edward F. Addy

Edward F. Addy

Footstown

Co. Meath

John Addy

At the trial the following evidence was given for the plaintiff:—

The plaintiff—"The defendants had a farm; they were evicted and were out of possession for many years. I lent them money from time to time. They were reinstated, and got £250 from the Estates Commissioners. They agreed to sign a promissory note for £50 at four months to secure the amount I advanced. I drew up the note and posted it. I cannot be certain was the date on it. It came back undated. I then filled in the date—30th June, 1910. When it fell due I asked for payment, and wrote to them several times. They never denied liability."

Cross-examined—"The promissory note was drawn up by me in my house, and was posted to the defendant Edward. It was undated when I sent it."

Robert P. Heeney, the plaintiff's son—"I was paid £7 on account by the defendant Edward on the 29th July, 1898. I entered it in a book" (entry produced). "I have seen my father advance money to the Addys from time to time."

Cross-examined—"He" (the defendant Edward) "said he owed my father a good deal of money, and that he was paying £7 on account. I accounted to my father for the amount."

K. B. Div. He also said that he signed the note as a witness to his
1910. father's signature.

HEENEY The following evidence was given by the defendants:—
v. ADDY.

Edward F. Addy—"I signed the note as an accommodation for him. He never lent me £50 or any amount. I handed the note to my brother John to sign."

Cross-examined—"I got cheque for £2, dated the 6th April, 1908, from the plaintiff; also cheque for £2 in March, 1908" (cheques entered). "All he lent me was £7, and I paid that back."

John Addy—"I got no loan from the plaintiff—sometimes charity—I got no letter until I got the writ."

Cross-examined—"I remember when the note came to be signed I saw the £50 in the corner of the note. I knew I was going bail for that amount."

The Judge's report, from which the foregoing note of the evidence is taken, stated that he was of opinion that the note complied in substance with the requirements of the Bills of Exchange Act, 1882, and contained all the essentials of a promissory note. That he believed the plaintiff's evidence and found for him. Judgment was accordingly entered for the plaintiff.

The defendants moved to set aside the judgment and to have judgment entered for them; or, in the alternative, for a new trial.

John Bartley (Patchell, K.C., with him), for the defendants:—

There are two essentials necessary to the validity of a promissory note. (1) A sum certain in money, which must (2) be payable to a specified person: section 83 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). This note does not contain either. It is impossible to ascertain from the note who is the promisee; and, even if it be admitted that the note is good, both the Heeneys should have sued on it; there is nothing in the note to show that Robert P. Heeney was merely a witness.

In the second place, the marginal figures are merely an index, and not part of the note: *Encyclopædia of the Laws of England*, vol. ii., p. 468; and evidence cannot be adduced to show that in fact there was a mistake in omitting words from the body of the

instrument: *Saunderson v. Piper* (1). Where there is a marginal figure, but the body is left blank, the document is incomplete till the blank is filled in: see *per* Bowen, L.J., in *Garrard v. Lewis* (2), at p. 34 of the report.

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The note was obviously intended as an accommodation bill; the body was left blank till an acceptor could be found, when it might have been filled for any sum up to £50.

Cuming, K.C. (*H. Hanna* with him), for the plaintiff:—

There is nothing in the Bills of Exchange Act, 1882, which says the body of a negotiable instrument must be filled up with the sum for which it is given. The statement to that effect, quoted from the judgment of Bowen, L.J., in *Garrard v. Lewis* (2), is only a *dictum*. All the parties to this note regarded and treated it as complete; the only question in controversy at the trial was, whether it was given for value or as an accommodation bill. The Judge's report states that he accepted the plaintiff's evidence as true.

Bartley, in reply.

GIBSON, J.:—

The defendant's case has been very exhaustively argued by his counsel, who relies on two points. The first is that, as the promissory note on which the action is brought only contains in the margin the figures of the amount sued for, but does not contain any sum written in the body of the note, the note is incomplete and will not support the action. The point must be decided by reference to the Bills of Exchange Act, 1882, so far as it applies. Section 9, sub-section 2, of that statute enacts that where the sum payable by a bill is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. The general custom is to state in words in the body of the instrument the sum payable, in addition to writing the figures in the margin and, when that is done, the sub-section which I have quoted, and

(1) 5 Bing. (N. C.) 425.

(2) 10 Q. B. D. 30.

K. B. Div. which reproduces the settled law on the subject, directs that the
1910. body is to prevail; but what is to happen if, as in this case, a sum
HEENEY is stated in figures in the margin, but is not stated in the body of
v. the note at all, either in words or figures? In support of his
ADDY. contention Mr. Bartley cited *Garrard v. Lewis* (1). That action
Gibson, J. was brought by a *bona fide* holder for value of a bill of exchange
against the acceptor. When the defendant signed the document,
the sum to be mentioned in the body of the bill was left blank,
but in the margin were the figures £14 0s. 6d., that being the
sum for which the defendant desired to accept. The drawer
subsequently filled in the blank in the body of the bill for
£164 0s. 6d., and fraudulently altered the figures in the margin
to that sum. If the figures in the margin were an essential part
of the note, the note, thus altered, would have been a forgery, and
an action upon it could not have been maintained. Bowen, L.J.,
who tried the case, decided that the defendant was liable on the
bill for the larger sum, on the grounds that the marginal figures
are not an essential part of a bill of exchange, and that one who
gives an acceptance in blank holds out the person to whom he
entrusts it as having authority to fill in the bill for any sum he
pleases within the limits of the stamp.

That decision has no bearing on the question now before us;
but in the judgment of Bowen, L.J., there is the following
passage. Referring to the note before him, he said: "A document
which contains such a marginal index, but in which a blank is
left by the acceptor to be filled in with the dominant, and all-
important, statement in the body of the bill defining the amount
for which it is accepted, is not a perfect bill till this dominant
portion of the bill has been filled in. The document is not invalid
simply because it is incomplete. It creates certain rights and
obligations, just as a blank acceptance does. But as the blank is
presumably intended to be filled with something, the document,
till this 'something' has been added, is not complete."

On the authority of this passage Mr. Bartley contends that
the note in this case is not complete, and, in its present state, has
no legal effect.

(1) 10 Q. B. D. 30.

I am not aware of any case which decides that, as between the original parties, if they choose to rely on figures in the margin, without filling in the body of the note, and treat the note in that form as complete, an action cannot be maintained upon it. The words in section 9, sub-sect. 2, of the Bills of Exchange Act, 1882, "where the sum payable is expressed in words and also in figures," rather suggest that, if the parties choose to rely on the figures in the margin, they may do so. I think that we ought to act on the rule that in construing a document like this, the Court ought, if possible, to give it operation, and that we should treat this instrument as being a valid promissory note for £50. It is said there is no authority upon the point, but our decision is recommended by honesty, as well as legal principles. It is to be noted that the plaintiff could have filled up the body of the note for £50, at least before action.

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The second argument advanced by Mr. Bartley is that the plaintiff is not entitled to sue by himself. Owing to the curious and inartistic way in which the note is drawn, it is not possible to tell, simply by looking at the note, whether the name which follows that of the plaintiff is intended to be that of a payee, or, as was proved by extrinsic evidence, the name of a witness to the plaintiff's signature. Mr. Bartley, therefore, contends that, if there are two payees, both must sue, and this action is not properly constituted. This argument may be at once dismissed as unsustainable.

Supposing no action could be brought on the note, the question of amending by suing on the consideration would require to be considered. There is ample authority for granting such an amendment to defeat a merely technical objection. In *Cropper v. Smith* (1), in a passage cited with approval by Holmes, L.J., in *Fisher v. The Nation Newspaper Co.* (2), Bowen, L.J., says (at p. 710 of the report):—

"I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in

(1) 26 Ch. D. 700.

(2) [1901] 2 Ir. R. 465.

K. B. Div. controversy, and I do not regard such amendment as a matter of
1910. favour or of grace. Order XXVIII., Rule 1, of the Rules of 1883,
HEENEY which follows previous legislation on the subject, says that 'all
v. such amendments shall be made as may be necessary for the
ADDY. purpose of determining the real questions in controversy between
Gibson, J. the parties.' It seems to me that as soon as it appears that the
way in which a party has framed his case will not lead to a
decision of the real matter in controversy, it is as much a matter
of right on his part to have it corrected, if it can be done without
injustice, as anything else in the case is a matter of right."

Applying that principle to the present case, if the note
is not a valid promissory note for £50, on the evidence and the
Judge's finding, there can be no defence to an action for the
consideration. The defendants' case was that the note was
only an accommodation note, and not given for value. The
Judge did not believe that evidence. An amendment such as
would overcome any technical objection is still possible, and,
if we thought it were necessary, we would follow the rule laid
down by Bowen, L.J., and give leave to make the amendment
now, but in the view we take no amendment is necessary.

BOYD, J., concurred.

Solicitors for the plaintiff: *Moynagh & Son.*

Solicitors for the defendants: *Molloy & Molloy.*

J. C. W.

THE KING (MARTIN) *v.* MAHONY (1).

*Justices—Jurisdiction—Conviction—Insufficiency of evidence—Certiorari—
Power of Superior Court to examine evidence.*

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M. was convicted by a Dublin Divisional Magistrate of an offence under sections 1 and 3 of the Betting House Act, 1853, on evidence which, if examinable, was insufficient to support the conviction. The prosecution was under the Dublin Summary Procedure Acts, 1 Vict. c. 25, and 5 Vict. c. 24, which prescribe a general form of conviction, not stating or incorporating the evidence. M. having applied to quash the conviction on *certiorari* on the ground of insufficiency of evidence:—

April 19, 20,
21, 22.
June 30.

Held, by the Court, that the conviction, being regular and following the statutory form, could not be quashed on such ground, as the evidence could not be examined.

Held, also, by Lord O'Brien, L.C.J., and Gibson, Madden, Boyd, Kenny, Wright, and Dodd, JJ. (Palles, C.B., dissenting), that the same principle applied to prosecutions under the Petty Sessions (Ireland) Act, 1851, and that neither the column in the Statutory order book directing witnesses' names to be stated, nor sect. 20, sub-s. 4, of that statute, which requires, on request, a note of the material part of the evidence given to be taken and signed by the Justice, incorporated the evidence, or enabled the Court to examine it on *certiorari*.

Held, by Lord O'Brien, L.C.J., and Gibson, Madden, Boyd, Kenny, and Wright, JJ., that the mere absence of evidence to warrant a conviction did not oust jurisdiction, but amounted merely to error as distinguished from want of jurisdiction. The reasoning on this point in *The Queen v. Sullivan* (22 L.R. Ir. 504, note), preferred to that in *In re Sullivan* (*Ibid.* 98), and *In re Heaphy* (*Ibid.* 500). *Brittain v. Kinnaird* (1 Br. & B. 432), and *The Queen v. Bolton* (1 Q.B. 66), discussed and applied. *In re Bailey* (3 E. & B. 607) and *In re Baker* (2 H. & N. 219) distinguished.

Held, by Palles, C.B., that the note in writing of the evidence signed by a Justice under section 20, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, is examinable by the King's Bench Division on *certiorari*, and if it does not disclose sufficient evidence of guilt, a conviction founded on it is liable to be quashed. *In re Sullivan* and *In re Heaphy* explained.

Per Dodd, J.—Where the Legislature does not require the evidence to be stated, whether the statute takes away, or does not take away, *certiorari*; and where there is nothing in the statutes which regulate the procedure, either by express provision or by necessary intendment, to make the depositions or a note of the evidence part of the record, the King's Bench Division cannot, on *certiorari*, inquire whether the facts proved warranted the conviction.

The effect of clauses excluding *certiorari* discussed.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, MADDEN, BOYD, KENNY, WRIGHT, and DODD, JJ.

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Henry Martin, the prosecutor herein, was, on the complaint of David White, an Inspector of the Dublin Metropolitan Police, charged on summons before Mr. Mahony, a Divisional Justice of the Dublin Metropolitan Police District, with having used a certain shop in the city of Dublin for the purpose of betting with persons resorting thereto. Witnesses were examined in support of the complaint; and their evidence was reduced to depositions signed by the witnesses and by the Justice. It is not necessary for the purpose of this report to set out the evidence, as it was admitted in the argument upon the present application that it was insufficient to warrant a conviction for the offence charged. The prosecutor was convicted and fined £10. The conviction was in the following terms:—

Police District of Dublin Metropolis, to wit,	}	Be it remembered that on the 24th day of March, in the year of our Lord 1909, before me, Daniel Mahony, one of the
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Divisional Justices of the said District, sitting at Inns Quay Police Court, in the County of the City of Dublin, in the said District, one Henry Martin, of 33 East Essex Street, Dublin, is convicted upon the oath of David White and others, credible witnesses, for that he, the said Henry Martin, on the 22nd day of March, in the year of our Lord aforesaid, at a certain place, to wit, the shop 3 Temple Bar, in the county of the city of Dublin, in said District, being a person using said shop, did use the same for the purpose of the said Henry Martin betting with persons resorting thereto, contrary to the statute in such case made and provided. I do, therefore, adjudge that the said Henry Martin do pay as a penalty for said offence the sum of £10.

The prosecutor obtained a conditional order for a writ of *certiorari* to bring up and quash the conviction on the ground that the Divisional Justice had acted without and in excess of jurisdiction, there being no evidence given before him that the prosecutor had used the shop in question for the purpose of betting with persons resorting thereto within the meaning of 16 & 17 Vict. c. 116. The prosecutor, in his affidavit filed to obtain the conditional order, referred to and made exhibits of copies of the depositions made on the hearing of the case. Cause having been

shown on behalf of the complainant in the summons, the present application was to make the conditional order absolute notwithstanding cause.

Ronan, K.C. (with him *William Magrath*), for the prosecutor:—

The conviction was under 16 & 17 Vict. c. 119, sects. 1 and 3. By section 14 *certiorari* is expressly taken away in the case of a conviction or judgment of Quarter Sessions on appeal, but is not taken away in the case of a summary conviction such as here. We contend that the evidence, as appearing on the depositions, was not sufficient to warrant the conviction, and that, *certiorari* not being taken away, this Court can look at the depositions. [*Serjeant O'Brien*—I admit that the case must be argued on the basis that *certiorari* is not taken away, and that the evidence was insufficient to warrant the conviction.] The question then is, Can this Court, in these circumstances, look at the evidence, and, if insufficient, quash the conviction? That is to say, is the Court to follow the decisions of the majority of the Court in the Exchequer Division in *In re Sullivan* (1) and *In re Heaphy* (2), or the decision of the King's Bench Division in *The Queen v. Sullivan* (3)? We submit that the correct view is that expressed by Palles, C.B., in the above-mentioned cases in the Exchequer Division, viz., that, a conviction made without sufficient evidence to sustain it is made without jurisdiction: and, where *certiorari* has not been taken away, this Court may look at the depositions for the purpose of seeing was the evidence sufficient. The law is stated in Burn's Justice of the Peace to be that a Justice in the exercise of his summary jurisdiction must proceed according to the course of the common law in trials by jury. The evidence must be such as the common law approves of, unless the statute otherwise directs; and "there must be a record of the whole proceedings, wherein the Justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a Superior Court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed by his jurisdiction": 1 Burn's Justice of the Peace, 30th ed., p. 1100. Formerly it was necessary that in a conviction the evidence should be set out particularly, not merely the result of it: *ib.*, p. 1150. The form of conviction prescribed by 3 Geo. 4, c. 23, provided that the evidence was to be stated, and as nearly

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(1) 22 L. R. Ir. 98.

(2) *Ibid.* 500.

(3) *Ibid.* 504, note

K. B. Div. as possible in the words of the witness. The evidence was the most important part of the conviction: Gabbett's Criminal Law, 1910. p. 622. The object of setting out the evidence was that sufficient proof should appear on the face of the record to sustain every material part of the charge; and that the Superior Court might be enabled to judge whether the Justices had done right in their adjudication, or whether their conclusions were warranted in point of law: *ib.*, p. 684; 1 Burn's Justice of the Peace, p. 1150; *R. v. Vipont* (1); *R. v. Kellett* (2). The Court above had a right to see that the evidence was sufficient in law to maintain the order, though it would not judge of the credit of the witnesses, or the weight of evidence: *The King v. Murray*, note (a) (3). The decision of the Justices was final in matters of fact only. Where the Justices determine on the law as distinguished from the facts, their decision can be reviewed: *The King v. Plowright* (4); *The King v. Reason* (5). The sufficiency of the evidence is a question of law. If there is any evidence tending to prove the offence, the Superior Court cannot judge of the degree of it; but if there is no evidence, the Court will quash the conviction: *The King v. Davis* (6); *The King v. Smith* (7).

As the law stood formerly, not only must there have been in fact sufficient evidence to sustain the conviction, but this evidence must have been set out on the face of the conviction. The necessity of setting out the evidence in the conviction was removed in Ireland, both as regards cases before the Dublin Divisional Magistrates and cases at Petty Sessions, by a series of statutes—1 Vict. c. 25, s. 26; 5 Vict. c. 24, Sch. B, Form 4; 12 & 13 Vict. c. 70, ss. 17, 35; Petty Sessions (Ireland) Act, 14 & 15 Vict. c. 93, s. 36, and form of conviction prescribed by Order Book; and in England by Jervis's Act, 11 & 12 Vict. c. 43, s. 17. But these statutes dealt with procedure merely; the object was to relieve the magistrates of the duty of setting out the evidence. It was never intended to take away the right a defendant previously possessed of having the conviction quashed where there was no evidence to sustain it.

(1) 2 Burr. 1163.

(5) 6 T. R. 375.

(2) 4 Burr. 2064.

(6) *Ibid.* 177.

(3) 3 Law Rec. (N. S.) 190, 191.

(7) 8 T. R. 588.

(4) 3 Mod. 95.

Justices of the Peace have three classes of jurisdiction:—(1) *K. B. Div.*
 Requiring sureties to keep the peace, and to be of good behaviour; 1910.
 (2) In certain cases to convict upon view; (3) Cases of summary *THE KING*
 jurisdiction. In the first class the evidence goes to jurisdiction, and *(MARTIN)*
 the Court may inquire into the sufficiency of it: *The Queen v. The* *r.*
Justices of Londonderry (1). In the second class view goes to *MAHONY.*
 jurisdiction: *The King v. The Marquis of Devonshire* (2); *The*
King v. Wilson (3). Why should not evidence go to the juris-
 diction in the third class?

The *Queen v. Bolton* (4) will be relied on by the other side. But all that case really decides is, that where there is a proper charge, and evidence offered for and against it, affidavits are not admissible for the purpose of showing that the magistrate's decision on the evidence was wrong. In that case there was in fact evidence adduced sufficient to support the charge, as appears from the judgment of Lord Denman, C.J., at p. 76. In *Osgood v. Nelson* (5) Lush, J., says (p. 159): "The decision in *Reg. v. Bolton* (4) supposes that evidence was given to the Justices which, if true, would support the charge." So in *The Colonial Bank of Australasia v. Willan* (6), there was, as is expressly pointed out by Sir James Colvile (p. 446), evidence to support the finding; moreover in that case *certiorari* was taken away, as it likewise was in *Ex parte Hopwood* (7).

In *re Bailey* (8), *In re Baker* (9), and *In re Authers* (10) show that where there is no evidence to warrant a conviction, there is no jurisdiction to convict, and that affidavits are admissible to show that there was no such evidence before the Justices. The same view is taken in the note to *Crepps v. Durden* (11).

[He also referred to *Barber v. Nottingham and Grantham Railway Co.* (12); *Thompson v. Ingham* (13); *The Queen (M^r Erlane) v. Justices of Co. Antrim* (14); *Rex v. Woodhouse* (15); *In re Alison* (16).]

(1) 28 L. R. 1r. 440.

(2) 4 A. & E. 698.

(3) 1 A. & E. 627.

(4) 1 Q. B. 66.

(5) 10 B. & S. 119.

(6) L. R. 5 P. C. 417.

(7) 15 Q. B. 121.

(8) 3 E. & B. 607.

(9) 2 H. & N. 219.

(10) 22 Q. B. D. 345.

(11) 1 Sm. L. C., 11th ed., at p. 651.

(12) 33 L. J. (N. S.) C. P. 193.

(13) 14 Q. B. 710.

(14) 1 New Ir. Jur. Rep. 209.

(15) [1906] 2 K. B. 501.

(16) 10 Ex. 561.

K. B. Div. *Serjeant O'Brien, K.C., and Dudley White, K.C. (with them*
 1910. *John Linehan), for the complainant in the summons:—*

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The conviction being regular on its face, and the charge being one within the jurisdiction of the magistrates, the Court cannot, on *certiorari*, go outside the conviction and inquire whether the evidence was sufficient to warrant it. This is the law as laid down in *The Queen v. Bolton* (1)—a decision which has never been questioned. The question there arose with reference to an order; and in the case of an order, as distinct from a conviction, it was not the practice, even under the old forms, to set out the evidence on the face of the document. The case therefore is exactly in point with respect to a conviction in the general form now prescribed. In *The Queen v. Bolton* (1) two points were made: first, that the proceedings being regular on the face, and disclosing a case within the jurisdiction of the magistrates, the Court could not look at affidavits for the purpose of impeaching the decision; secondly, that even if the affidavits were looked at, there was evidence to sustain the conviction. Lord Denman, in his judgment, treats the first point quite distinctly from the second. Dealing with it, he says that all the Court can do is to see that the case is one within the jurisdiction of the magistrates, and that the proceedings on the face are regular. He lays down that affidavits are admissible to show that the magistrates never should have begun the inquiry, the charge being one over which they had no jurisdiction; but that where the charge on its face is within his jurisdiction, the magistrate is bound to commence the inquiry, and affidavits are not admissible to show his decision is wrong; and he goes on to say—"The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." In *Brittain v. Kinnaird* (2), it was held that a conviction by Justices under the Bumboat Act was conclusive evidence that the vessel in question was a boat. The principle is there laid

(1) 1 Q. B. 66.

(2) 1 Br. & Bing. 432.

down as well established that, where a magistrate has jurisdiction, a conviction, having no defects on its face, is conclusive. Dallas, C.J., takes the extreme case of a man seizing a ship of seventy-four guns and calling it a boat, and states that the conviction would still be conclusive, the remedy of the party being to proceed criminally. In *Cave v. Mountain* (1), Tindal, C.J., states (p. 262) that "if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation"; and this proposition is adopted by Lord Denman, C.J., in *The Queen v. Bolton* (2) and by A. L. Smith, J., in *Ex parte Wake* (3). *Brittain v. Kinnaird* (4) and *Cave v. Mountain* (1) were no doubt cases of actions of trespass against the magistrates, but they are authorities no less in point in *certiorari*: *The Queen v. Bolton* (2), per Lord Denman, C.J. (p. 75). In *Colonial Bank of Australasia v. Willan* (5), Sir James Colville, delivering the judgment of the Privy Council, after pointing out (p. 442) the circumstances that will amount to absence of jurisdiction, goes on to say that an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it; and he states that the Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question the Judge was competent to decide. He then cites *Reg. v. Bolton* (2) and *Reg. v. St. Olave* (6) as establishing that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not, on *certiorari*, quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. This statement of the law is adopted

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(1) 1 M. & G. 257.

(2) 1 Q. B. 66.

(3) 11 Q. B. D. 291, at p. 298.

(4) 1 Br. & Bing. 432.

(5) L. R. 5 P. C. 417.

(6) 8 E. & B. 529.

K. B. Div. by Vaughan Williams and Fletcher Moulton, L.J.J., in *Rex v. 1910. Woodhouse* (1). It is true that in *Willan's Case* (2) there appears to have been some evidence to support the finding; but, as in *The King (MARTIN) v. MAHONY. The Queen v. Bolton* (3), the judgment deals with the broader question as a distinct question. The statement of Lush, J., in *Osgood v. Nelson* (4) as to the ground of decision in *The Queen v. Bolton* (3), was merely an interlocutory remark made in the course of the argument. It is opposed to his own decision in *In re Blewitt* (5). In *The Queen v. Whitfield* (6) Sir James Hannen states the effect of the decisions in *The Queen v. Bolton* (3) and other cases to be that the question of the jurisdiction of Justices depends not on the correctness of the order they may make, but on whether they had the right to enter upon the inquiry in the course of which they make the order sought to be impeached. In *Ex parte Hopwood* (7) the defendant was convicted without any evidence of the facts charged, and it was held that *certiorari* did not lie. It is laid down in the judgments in that case that want of evidence cannot take away jurisdiction, and that if the magistrates had any jurisdiction to proceed, the Court cannot ask whether they heard evidence at all. No doubt, in that case, as in some of the others cited, *certiorari* was taken away, but no reliance was placed on this. The only effect of a provision taking away *certiorari* is to prevent a conviction being quashed for want of form. If the contention was correct that insufficiency of evidence amounted to want of jurisdiction, it would follow that the conviction could be quashed on this ground, even though *certiorari* was taken away. But, admittedly, this is not the law.

Informations or affidavits were never ordered to be returned on *certiorari*, and a return setting them out was irregular: *Anon. Case*, Lofft, p. 348; *The Queen v. Inhabitants of Abergele* (8).

Under the old procedure, which required the evidence to be set out on the face of the conviction, if the evidence appeared insufficient,

(1) [1906] 2 K. B. 501, at pp. 515, 516, 537.

(2) L. R. 5 P. C. 417.

(3) 1 Q. B. 66.

(4) 10 B. & S. 119.

(5) 14 L. T. (N. S.) 598.

(6) 15 Q. B. D. 122, at p. 144.

(7) 15 Q. B. 121.

(8) 8 A. & E. 394.

the Court quashed the conviction, not because insufficiency of evidence amounted to want of jurisdiction, but because the conviction was nonsense on its face. The expression used by Mr. Ronan in arguing *Heaphy's Case* (1) was that the decision was "inconsequent." The object of the Legislature in prescribing a general form of conviction, not setting out the evidence, was to preclude the Superior Court from examining into the sufficiency of the evidence. On the other hand, the defendant was protected, first by an appeal being given, and subsequently by 20 & 21 Vict. c. 43, under which the Justices may be required to state a case. An alteration in procedure may affect substantive rights. Thus, the effect of Order XI., Rule 1, of our Judicature Rules of 1891, dealing with service out of the jurisdiction, was to deprive an injured husband in this country of an action of crim. con. where the wrong-doer resided in England, since in such case leave could not, under this rule, be obtained to serve the writ out of the jurisdiction, and the party could not be sued in England, as no such action lay in the English Courts. It was accordingly found necessary to make special provision for a case of this kind by Order XI, Rule 1 (i.) of the Rules of 1905.

The King v. Smith (2) was decided under the old procedure. It cannot be considered as law at present, having regard to *The Queen v. Bolton* (3). In *Bailey's Case* (4) and *Baker's Case* (5) the decision of the Justices was upon collateral facts which were conditions precedent to jurisdiction. Cases of sureties of the peace have no application here. They depend on the procedure peculiar to such cases, as has been pointed out in *The Queen v. Justices of Londonderry* (6).

In re Russell (7) and *The King (Burke) v. Justices of Galway* (8) decide that, in the case of an order of Quarter Sessions affirming a conviction, the existence or sufficiency of the evidence cannot be inquired into. *The King (Roe) v. Justices of Roscommon* (9) shows that no distinction in this respect exists between Quarter Sessions

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(1) 22 L. R. Ir. 500.

(2) 8 T. R. 588.

(3) 1 Q. B. 66.

(4) 3 E. & B. 607.

(5) 2 H. & N. 219.

(6) 28 L. R. Ir. 440.

(7) 22 L. R. Ir. 487.

(8) [1906] 2 I. R. 446.

(9) [1905] 2 I. R. 101, 112.

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 1910. Petty Sessions Act, compelling the Justices, if required so to do
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[They also referred to *In re Thompson* (1); *Mould v. Williams* (2);
St. George's Vestry v. Sparrow (3); *The Queen v. Allen and others* (4);
The Queen v. M'Naghten (5); *The Queen v. O'Brennan* (6); *The*
Queen v. Hamilton and Baker (7); *The King (Wexford County*
Council) v. Local Government Board for Ireland (8); Paley
 on Summary Convictions, 8th ed., p. 442; Lord Halsbury's Laws
 of England, vol. x., p. 194.]

Magrath in reply.

Cur. adv. vult.

June 30.

LORD O'BRIEN, L.C.J.:—

Having considered this case with all the care I could bestow
 on it, I have arrived at the conclusion that the writ of *certiorari*
 applied for should not be granted.

In the first instance, I am very anxious to point out what the
 question before us is, and what it is not. The controversy before
 us does not involve the question whether there is any remedy if a
 magisterial tribunal makes a mistake; that is not the question.
 The question here is whether the proper remedy is sought, and not
 whether there is no remedy. In this case it was open to the
 defendant in the summons to appeal to the Recorder of Dublin,
 before whom the whole controversy on the law and merits could
 be exhaustively treated. It was competent also for the accused to
 get a case stated for the High Court, where the question involved
 could be authoritatively determined. This is expressly pointed
 out by Lord Justice A. L. Smith in *Ex parte Wake* (9), and by
 Mr. Baron Dowse in *Heaphy's Case* (10). This is an elementary
 matter which cannot be gainsaid. But the question here is whether
 the defendant, having omitted to pursue a course that was obvious
 and patent, can have recourse to another method of challenging an
 adverse decision; whether, in fact, he can challenge by way of

(1) 6 H. & N. 193.

(7) 6 Ir. Jur. (N. S.) 154.

(2) 5 Q. B. 469.

(8) 35 I. T. L. R. 87; 1 New Ir.

(3) 33 L. J. M. C. 118.

Jur. 149.

(4) *Ibid.* 98.

(9) 11 Q. B. D. 291, at p. 298.

(5) 9 I. L. R. 93.

(10) 22 L. R. Ir. 500.

(6) 3 I. C. L. R. 589.

certiorari what it was most undoubtedly, indeed *ex concessis*, open to him to challenge by appeal or by case stated. If an accused person departs from the beaten path, the *via trita* of our law, and finds himself impeded, fails to attain his object by reason of his having adopted an abnormal course, he must blame himself and not the law; indeed, in this particular instance, there is the less excuse for going wrong, as, notwithstanding the warning given by the difference of opinion between the Court of Queen's Bench and the Court of Exchequer, the authorized, the accustomed remedy for the detection and correction of error, if it existed, was not pursued. Unacquaintance with legal methods cannot help or excuse the errors of litigants. If we were to allow such an excuse to prevail, we should ignore one of the most familiar maxims of the law and create a welter of confusion.

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What, then, is the question we have to determine, and what is the law? The main, the all-important, question we have to determine is whether, in a case of a criminal or penal nature within the summary jurisdiction of magistrates, mere insufficiency of evidence to warrant a conviction or order destroys *jurisdiction*. This is the question which lay at the root of what I may describe as the historical difference of opinion between the Courts of Queen's Bench and Exchequer. See 22 L.R.I. 500, and p. 504, note.

What is the law? We cannot legislate—a disability which is not unattended with a feeling of relief. We must ascertain what the law is from the relevant decisions in our law books.

It is conceded—the argument proceeds on the basis—on the hypothesis—that the *charge* is adequate, properly laid, and within jurisdiction; that there is authority to enter upon the case and to commence the inquiry; but it is contended that the fact that the evidence, such as it was, did not authorize a conviction, ousts, destroys, jurisdiction. I emphasize the word “jurisdiction.” Want of jurisdiction is one thing; *error* on the face of the conviction, where the evidence is incorporated, is another. I will make manifest what I mean when I come to the case of *R. v. Smith* (1), in respect of which case there was so much debate and controversy in the Exchequer Division in *In re v. Sullivan* (2) and *Heaphy's Case* (3). For the present I turn to *The Queen v. Bolton* (4), a

(1) T. R. 588. (2) 22 L. R. 1r. 98. (3) *Ibid.* 500. (4) 1 Q. B. 66.

K. B. Div. case in which there was no right of appeal, and with reference to
 1910. which *certiorari* was not taken away ; and I shall read that passage
 THE KING in Lord Denman's judgment, which is a *locus classicus* in the
 (MARTIN) treatment of this question of *certiorari*, and to which I more than
 v. once called attention during the argument before us. It is as
 MAHONY. follows (I give the language of Lord Denman ; it will be per-
 Lord O'Brien, ceived that he dealt with the question of jurisdiction) :—
 L.C.J.

“The question of *jurisdiction*,” said the learned Chief Justice, “does not depend upon the truth or falsehood of the charge, *but upon its nature*. It is determinable at the commencement, and not at the conclusion, of the inquiry ; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.” This is the well-known passage in Lord Denman's judgment. I emphasize the word “charge,” and the words “its nature.” The word “charge” is plainly used in contradistinction to evidence which might or might not support a charge. This passage is set out *verbatim, ipsissimis verbis*, in Lord Morris's judgment in *The Queen v. Sullivan* (1). It is not set out or specifically referred to in either of the Exchequer judgments. Why should it not apply to the case before us ? I do not refer to cases of a different character, such as cases of ouster or cesser of jurisdiction produced by some fact collateral to the merits, nor to cases of fraud or wilful abuse of his position by a magistrate, such as a refusal to hear the person accused or his witnesses ; nor to cases as to whether there may be uncertainty or ambiguity in the character of the charge made, nor to cases where, the evidence being set out or incorporated, there may be error on the face of the conviction or order. I take the case before us—the particular case before us—and ask why Lord Denman's proposition should not apply to it. To my mind it manifestly applies to and governs it, and concludes the controversy against the defendant. The charge *ex concessis* is right ; it is within the jurisdiction of the magistrate. Nothing occurred in the progress of the inquiry to compel the magistrate to stop, to stay, his hand. Indeed, it is admitted that the magistrate had jurisdiction to acquit, but it is

(1) 22 L. R. Ir., p. 504, note.

said he had no jurisdiction to convict; that he was not within jurisdiction in convicting by reason of the failure of evidence; that is to say, that jurisdiction at a given moment was a one-sided thing, a sort of lop-sided power. This, in my opinion, is plainly wrong. It confounds want of jurisdiction with error in the exercise of it. Once it is obvious, and it is so here *ex hypothesi*, that the charge as stated is properly, adequately, stated, and within jurisdiction, one cannot go further except in such cases, such matters, as I have excluded from discussion as not being involved in the present controversy. To grant *certiorari* merely on the ground of want of jurisdiction, because there was no evidence to warrant a conviction, confounds, as I have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorize a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction. I might here refer to a passage in Paley on Summary Convictions, at page 76 of the 8th ed., where it is stated that—"A sufficient information by competent persons, relating to a matter within the magistrate's cognizance, gives him jurisdiction, irrespective of the truth of the facts contained in it. His authority to act does not depend on the veracity or falsehood of the statements, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." For this statement of the law, which I consider accurate, the learned editor refers, amongst other cases, to *The Queen v. Bolton* (1).

I might also refer to what Mr. Justice A. L. Smith said in giving judgment in *Ex parte Wake* (2). The facts and character of that case were different from those in the case before us, but he adopts the general proposition to which I referred. He is reported to have said (p. 298):—"I cannot better express my view upon that part of the argument than by adopting the language of Denman, C.J., in *Reg. v. Bolton* (1). He says: 'But if the

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(1) 1 Q. B. 66.

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in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend on the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation.'"

I wish it to be clearly understood that I am not dealing with a case in which a magistrate so misconducted himself as to refuse to hear evidence or argument. No doubt, in all matters of procedure, the essentials of justice must be observed. It is one of the essential requirements of justice that a charge should be duly formulated: that an accused person should have due notice of it; and that he should be given an adequate opportunity of defending himself. Such matters are not mere formalities; they are the essential requirements of justice. But here the contention is that mere want of evidence sufficient to warrant conviction constitutes want of jurisdiction, and that that is so whilst it is admitted that there was jurisdiction to enter upon the inquiry and jurisdiction to acquit.

As to the expression "want of jurisdiction," I might refer to *R. v. Bradley* (1). The facts and the precise character of that case were, no doubt, different from those of the case before us; but in my opinion the judgment of Cave, J., accurately illustrates what is meant by a clause taking away *certiorari*, and by the expressions "want of jurisdiction," "excess of jurisdiction." In *R. v. Bradley* (1) there was a summons under the Highway Act of 1864. The defendant was convicted. Neither summons nor conviction stated that the defendant had "encroached" (the word used in the statute) on the highway. As the circumstances showed an "encroachment" in fact, the Court held that this was a mere objection to the form of the summons and conviction, and that, *certiorari* being taken away, objections on the ground of form should not be allowed to prevail; and, as to the meaning of the expression "want of jurisdiction" or "excess of jurisdiction," Mr. Justice Cave said—"Excess of jurisdiction may either exist at the time when the summons comes on to be heard, and in that case there is no jurisdiction to hear the case at all, or it may in

some cases crop up in the course of the hearing, as, for example, where the question of title to land comes into question, and in such a case the jurisdiction of the magistrate is ousted. When-
 ever either of these two things happens, if the magistrates proceed to hear and determine the case, their decision must be brought up by *certiorari* for the purpose of being quashed as being in excess of jurisdiction If the magistrates have no jurisdiction, they cannot proceed with the case, either to convict or to acquit; they have no jurisdiction to do either; they must stop short. That is the meaning of the expression 'want of jurisdiction,' and that is what is meant by saying that magistrates have exceeded their jurisdiction." Later on in his judgment he said—"Where a magistrate decides one way when he ought to have decided another way, that is not absence of jurisdiction. Absence of jurisdiction only arises when he has no power to decide in the matter at all." It is conceded here in the case before us that the magistrate was competent to deal with the case by acquitting. It is manifest, in my opinion, there was not any ouster of jurisdiction. Mr. Mahony was at no time bound to stay his hand. Mr. Justice Cave concluded his judgment in *Bradley's Case* (1) by holding that effect could not be given to the objection as to mere form, *certiorari* being taken away, and that the conviction could not be interfered with by the Court, as there was no want of jurisdiction established to exist in the case. To the same effect is the expression of opinion of Mr. Justice Cave in *Ex parte Wake* (2), where he said, "If jurisdiction is not altogether taken away, there is no want of jurisdiction." *Ex parte Wake* (2) was no doubt a case of a different character, but the opinion of the learned Judge is relevant to the question before us. As to the effect of a clause taking away *certiorari*, see also the judgment of Lord Campbell in *R. v. Badger* (3), where he is reported to have said:—"The very object of the Legislature in taking away *certiorari* was to prevent informality being made available to vitiate the order." In my opinion, in the case before us, there is neither informality nor want of jurisdiction. The main principle established by *The Queen v. Bolton* (4), that it is the nature of the charge that

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(1) 70 L. T. (N. S.) 379. (2) 11 Q. B. D. 289. (3) 6 E. & B., at p. 171.

(4) 1 Q. B. 66.

K. B. Div. establishes jurisdiction, adopted as that principle has been in
 1910. an unbroken line of authority from 1841 to the present day,
THE KING a period of nearly seventy years, in my opinion, concludes the
 (MARTIN) case against the defendant here. The argument of the learned
 v. serjeant was valuable and effective in discriminating between
 MAHONY. the first and second points with which Lord Denman dealt. And
 Lord O'Brien, it is, in my opinion, by not discriminating between these two
 L.C.J. points that some confusion has been imported into the case. If you do not discriminate between the two points mentioned by Lord Denman, and treat them distinctively, as he did, his judgment becomes illogical, inconsistent, and confused. You make him say the very thing he did not say. You make jurisdiction depend, not as he said it should depend, on the nature of the charge, but upon the evidence that may prove or fail to prove it. You confound conclusion from evidence with jurisdiction. You confound what the magistrate has to try with his jurisdiction to try it. You confound want of jurisdiction with error appearing upon the face of the proceedings; which may justify a conclusion or order being quashed when the evidence, when set out or incorporated, does not warrant the conclusion arrived at—but this does not establish want of jurisdiction.

I think I might stop here; but I turn to *The Colonial Bank of Australasia v. Willan* (1). I take the passage in the judgment of Sir James Colville, which was so much adverted to. He is reported (at page 443 of the report) to have said:—"The authorities of which *R. v. Bolton* (2) and *R. v. St. Olave* (3) may be taken as examples establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defect appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found." This passage in the judgment of Sir James Colville is very much in point here, because Mr. Mahony had jurisdiction over the subject-matter, and there clearly is no error on the face of the order.

(1) L. R. 5 P. C. 417.

(2) 1 Q. B. 66.

(3) 8 E. & B. 529.

It is said, however, that in the latter case, *Willan's Case* (1), there was evidence, other than that inferable from the adjudication, of an essential fact—the existence of a debt. Special attention was more than once called by the Court during the argument before us to the passage in Sir James Colville's judgment at page 446, where he said: "Nor can it be said there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly refers to the debt." Did Sir James Colville intend to make the fact that there was evidence by affidavit of the existence of a debt part of his *ratio decidendi*? I think not. As to this I am of opinion that the *ratio decidendi* of the Court was independent of, and extrinsic to, this passage; and that the passage simply meant that, should a question be raised as to evidence of a debt other than evidence to be inferred from the adjudication, it was to be found in the affidavit; but that, so far as related to the opinion of the Court itself, to the opinion of the presiding members of the Privy Council, this was not essential; and that their *ratio decidendi* was to be found in the immediately antecedent passage, which summarizes the grounds of their judgment—indeed, it appears to me that the passage I have quoted from Sir James Colville's judgment, at page 443, where he deals with the effect of *The Queen v. Bolton* (2) and *St. Olave's Case* (3), makes this absolutely plain. I might also refer to the opinion of the learned Lords Justices who heard *The King v. Woodhouse* (4), so late as 1906. See p. 515 of the Report. No doubt the judgment itself was reversed in the House of Lords on another ground; but the very valuable opinion of those very eminent Judges remains.

What fact, then, must the primary tribunal, the magistrate, be taken to have found? This, namely, that the charge stated in the conviction, which, *ex hypothesi*, was accurately and sufficiently stated and within jurisdiction, was established in point of fact. The establishment of the charge necessarily involved guilt; and the character of the penalty is warranted by the statute. There is no excess of jurisdiction in this respect; there is no error on the face of the conviction.

(1) L. R. 5 P. C. 417.

(2) 1 Q. B. 66.

(3) 8 E. & B. 529.

(4) [1906] 2 K. B. 501.

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A great many other topics have been adverted to, as to which perhaps I should make a short reference. In the case *Ex parte Vaughan* (1), to which I called the attention of my brethren, there are some passages in the judgment of Cockburn, C.J., which would perhaps at first sight militate against the view I have taken of *The Queen v. Bolton* (2). Now, in reference to what the learned Chief Justice said in *Ex parte Vaughan* (1) as to *The Queen v. Bolton* (2), I think that he was referring to what was called the second point in that case, namely, what should be done on the assumption that the evidence could be examined. Cockburn, C.J., was not applying himself to the question whether it was the charge, as distinguished from the evidence, that conferred jurisdiction. But whatever ambiguity or difficulty may be presented by *Ex parte Vaughan* (1), which of course was a different class of case from the present, all uncertainty and difficulty seem to be removed by the subsequent decision of Cockburn, C.J., *Reg. v. Russell* (3). He is there reported to have said: "The rule on which this Court acts as to summary convictions by magistrates is that it looks to see whether there was foundation for their jurisdiction, that is, *whether they had a right to enter upon the inquiry*. When once it is found that they had, this Court will not take on itself to determine whether it would have come to the same conclusion; it rigidly excludes all consideration whether their conclusion was right on the merits, and will not interfere unless, in the course of the inquiry, something has taken place inconsistent with natural justice, or rather, as I prefer to call it, rational justice, or something has been omitted, without which justice could not be administered, *e.g.*, the hearing of witnesses." This passage in the learned Chief Justice's judgment should be read in connexion with the argument of Mr. Mellish and Mr. Chambers in the same case.

But to return to *The Queen v. Bolton* (2). The decision in that case rested upon *Brittain v. Kinnaird* (4) and *Cave v. Mountain* (5). What, then, were the principles laid down in these cases? Sir John Richardson is reported to have said: "Where a magis-

(1) L. R. 2 Q. B. 114.

(2) 1 Q. B. 66.

(3) 10 B. & S., at p. 117.

(4) 1 Br. & Bing. 432.

(5) 1 M. & G. 257.

trate has jurisdiction his conviction is conclusive evidence of the facts stated in it." The passage quoted by Lord Denman in his judgment in *R. v. Bolton* (1), taken from *Cave v. Mountain* (2), runs thus:—"But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." These cases, Lord Denman went on to add, were both of them "actions of trespass against the magistrate convicting; but," he added, "they are authorities not on that account the less in point on the present occasion." It will be seen that Lord Denman did not confine the application of this case to actions of trespass against magistrates; and note the language quoted by his Lordship, "or upon the evidence being sufficient or insufficient to establish the *corpus delicti*." Mark the word "insufficient." Is not this the very point here? What is the *corpus delicti* in this case? It is stated in the conviction; it is the charge which, as I have said, is, *ex hypothesi*, correctly stated in the conviction. It is, *ex hypothesi*, a clear, unequivocal statement of a charge within the jurisdiction of the magistrate, followed by an appropriate penalty warranted by statute, and in no way in excess of jurisdiction.

Bayley's Case (3) and *Baker's Case* (4) present no difficulty to me. They were clearly conversant with conditions precedent to jurisdiction, and were rightly so classed in Lord Halsbury's valuable treatise on the Laws of England (see vol. 10, pp. 193 and 194).

Indeed, it is only requisite to read the arguments in these cases to see that this was so. *Auther's Case* (5), not in itself a very satisfactory one, purported to follow *Baker's Case* (4) and *Bailey's Case* (3). These cases should be read in connexion with the well-known case of *Bunbury v. Fuller* (6). *Ex parte Hopwood* (7) is not an unimportant case. There is no case more frequently referred to on this subject in our books than this case,

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(1) 1 Q. B. 66.

(2) 1 M. & G. 257.

(3) 3 E. & B. 609.

(4) 2 H. & N. 219.

(5) 22 Q. B. D. 345.

(6) 9 Ex. 111.

(7) 15 Q. B. 121.

K. B. Div. and the judgment is the unanimous exposition of the law by four
 1910. very distinguished Judges. Though not essential to the support of
 THE KING my judgment, still I think I could claim it as supporting it. The
 (MARTIN) principles deducible from that judgment are important. It was a
 v. case in which *certiorari* was taken away; but in order to get rid of the
 MAHON Y effect of this deprivative provision, two arguments were advanced
 Lord O'Brien, on behalf of the defendant; first, that the defendant did not get
 L.C.J. reasonable notice of the charge; and secondly, that there was no
 evidence of the offence charged. This argument did not prevail
 with the Court. Mr. Justice Patteson said: "As to want of
 evidence on matter of fact, that cannot possibly take away juris-
 diction; no case can be cited where that has ever been said."
 Mr. Justice Wightman delivered a short judgment, every word of
 which is important. He said:—

"The *certiorari* is here taken away; but Mr. Pashley relies upon two grounds. First, he says there has not been reasonable notice; and he contends, very properly, that reasonable time should be given; that may be quite correct. But the magistrates have to determine as to that in the first instance; they have power to enter upon the inquiry, and have therefore jurisdiction. Then, as to want of evidence, if the magistrates had any jurisdiction to proceed, we cannot ask whether they heard evidence at all, or whether the evidence they heard ought to have led them to an opposite conclusion."

This is the language of Mr. Justice Wightman. I am careful to read every word of his judgment; to read an excerpt from it, as was apparently done in *Heaphy's Case* (1), only leads to misunderstanding. Does it not plainly mean that mere absence of evidence does not take away jurisdiction, does not constitute a want of jurisdiction; that it does not remove the disability which follows from *certiorari* being taken away; that, in fact, want of evidence is not want of jurisdiction? Lord Campbell at the close of the judgment said that in the cases referred to by counsel for the defendant the magistrates had no jurisdiction over the subject-matter. Here, *ex concessis*, the magistrates had jurisdiction over the subject-matter, but it is alleged that failure of

proof caused a cesser of *jurisdiction*. In the whole history of the law I do not think that, as Mr. Justice Patteson said, any case can be found to establish such a proposition. No doubt convictions have been quashed when the facts appearing on the face of the conviction or order did not support the conclusions arrived at; but error is one thing—*jurisdiction* another.

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Though this case of *Ex parte Hopwood* (1) is not essential to support the judgment that I have arrived at, I cannot afford to deal lightly with it. It was the unanimous decision of Lord Campbell, Mr. Justice Patteson, Mr. Justice Wightman, and Mr. Justice Erle. The expression in the judgment of Mr. Justice Wightman that the Court could not, if the magistrates had any *jurisdiction* to proceed, ask whether they had any evidence at all, has been severely animadverted upon; but it must be remembered that the learned Judge was not dealing with "case stated," but with *certiorari*, and the principles applicable to *certiorari*. He was dealing with the mere want of evidence. Of course if a magistrate refuses to hear witnesses or evidence, he would be guilty of judicial *misconduct*, which could be challenged by *certiorari*. If there is no evidence to support an incriminating conclusion, a magistrate can be compelled under the "Case Stated" Act to state a case. Mr. Justice Wightman was dealing merely with absence of evidence *qua* evidence; he was not dealing with a refusal to hear evidence which would indicate judicial *misconduct* which could be challenged by *certiorari*. As I have said, there is no case in our books on the subject of *certiorari* more frequently referred to than the case of *Ex parte Hopwood* (1). It is, as I have already pointed out, the unanimous decision of four very eminent Judges. The Lord Chief Baron refers to it in *Heaphy's Case* (2); but with great deference, so far from supporting the conclusion arrived at in that case, it is, so far as it goes, in my opinion, an authority the other way. However, as I have said, it is not at all essential to my judgment, and I pass from it.

I now come to *R. v. Smith* (3), so much adverted to in the

(1) 15 Q. B. 121.

(2) 22 L. R. Ir. 500.

(3) 8 T. R. 588.

K. B. Div. 1910. *Exchequer decisions in John Sullivan's Case (1) and Heaphy's Case (2).* In these cases *R. v. Smith (3)* was dealt with as involving a question of jurisdiction. No doubt in *R. v. Smith (3)* a conviction was quashed because the evidence did not support a material part of the information. There was not one word said as to jurisdiction or the want of it, either in the argument or in Lord Kenyon's judgment. The evidence was embodied in the conviction; and the Court, looking down at the conviction, and seeing the evidence, and perceiving that the evidence which they saw on the face of the conviction did not warrant that conviction, detected error on the face of the proceedings, and accordingly quashed the conviction, not for want of jurisdiction on the part of the magistrates, to which the members of the Courts made no reference whatever, but because the evidence which they saw did not warrant a conviction. That case was simply a miscarriage within jurisdiction, because there was error on the face of the proceedings, the evidence being set out and not warranting conviction.

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Such expressions as "without jurisdiction," "want of jurisdiction," "in excess of jurisdiction," are used, I might say, broadcast in our books of practice; and no doubt convictions and orders were most frequently quashed because they were made without and in excess of jurisdiction; but, to my mind, it is plain that, independently of the question of jurisdiction, convictions and orders were quashed under the wide supervising authority of the Queen's Bench, when error appeared on the face of the conviction or order, by reason of the evidence that appeared there not warranting the conclusion arrived at. Procedure by *certiorari* is not at all exclusively connected with cases of jurisdiction or its absence. It is simply a method of bringing the proceedings of inferior Courts into the Queen's Bench; and when the evidence was incorporated with the conviction, they were in the nature of speaking orders that might be quashed by the Queen's Bench if there was no evidence to support the averments in the information. They were, in effect, analogous to speaking orders sent by Quarter Sessions to the Queen's Bench. (See judgments of Lords Cairns and Penzance in the *Walsall Case (4)*).

(1) 22 L. R. Ir. 98.

(2) 22 L. R. Ir. 500.

(3) 8 T. R. 588.

(4) 4 App. Cas. 30.

There remains one topic to which I desire to advert, viz., the form of the order or conviction. This topic is of very great general importance. The conviction or order here does not expressly, nor, in my opinion, impliedly, incorporate, embody, the evidence; nor was there any obligation on the magistrate to embody it in his order. In *R. v. Eaton* (1) it was laid down as a general proposition, subject to no limitation as to *certiorari* being taken away or otherwise, that "where an Act gives a general form of conviction, the party can have no benefit from *certiorari* because the proceedings and examination need not be returned, but the conviction only, which, being general, cannot exhibit the error on the proceedings." This statement was *per curiam*, the unanimous opinion of the Court; and had, and was in my opinion intended to have, a general application. And what Lord Campbell said in *Geswood's Case* (2) must be remembered. He is there reported to have said:—"It was always common in Acts to deprive the person convicted of the opportunity of cavilling at the evidence by giving a form of conviction which did not require it to be set out; and now, by the Statute 11 & 12 Vict. c. 43, s. 17, such a form is given generally." So, too, in this country, under the Petty Sessions Act, and the Act which regulates proceedings in the Divisional Magistrate's Court, forms are given where evidence is not set out. Indeed, it was with reference to the effect of the Petty Sessions Act and the form therein referred to, that the argument before us on this point principally proceeded. No doubt the Act which regulates the proceedings before a Divisional Magistrate was referred to, but the argument on this point mainly dealt with the Petty Sessions Act. And it must be borne in mind that the Case Stated Act obviates any suggestion of hardship or grievance that might arise from evidence not being embodied in a conviction. Whether the evidence is sufficient to warrant a conviction is a question of law, in respect of which magistrates can be compelled to state a case under the Case Stated Act.

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Finally, it must be remembered that a Petty Sessions Court is a Court of Record. So is the Court of a Divisional Magistrate.

(1) 2 T. R. 285.

(2) 2 E. & B., at p. 954.

K. B. Div. 1910. *THE KING (MARTIN) v. MAHONY.* Lord O'Brien, L.C.J. What is the record here? Of what does it consist? Of a statement of the charge which, *ex concessis*, *ex hypothesi*, is adequate and correct; of the adjudication of guilt, and of the imposition of a penalty warranted by law. There is no error on the face of the record: and this being so, the maxim *res judicata pro veritate accipitur* applies, and concludes, in my opinion, the case against the defendant. What is called in our law books "the uncontrollable verity of the record" must be allowed to prevail.

Before I conclude I may say for my brethren and myself that I think that never in the history of the law, at least so far as relates to this country, did a case receive more careful, more exhaustive consideration, than the one with which we are dealing. We had, of course, before us the judgments delivered in the case of John Sullivan. The unanimous judgment of Lord Morris, C.J., Harrison, Murphy, and O'Brien, JJ., on the one side (1), and of the Lord Chief Baron and Andrews, J., on the other side, from which Dowse, B., dissented (2). We had also the judgment of the Lord Chief Baron and Andrews, J., in *Heaphy's Case* (3), from which also Mr. Baron Dowse dissented.

We had in this case a most exhaustive argument before us. I wrote out myself and submitted to my brethren what I fear was an inordinately long memorandum of questions. A judgment written by my brother Gibson, where all the cases on the subject were referred to with monumental industry, was also circulated for consideration amongst us. I concur in the conclusion at which he arrived. So do my brothers Kenny, Madden, and Boyd, who are unavoidably absent. My only regret is that I cannot claim in every respect the concurrence of the Lord Chief Baron, for whose opinion I, in common with the entire Bench, have so much, so very much, respect.

One topic more.

The Queen v. The Justices of Londonderry (4) does not in any way conflict with the conclusion I have arrived at in this case. Jurisdiction to bind to the peace, or to compel sureties for good behaviour, attaches only when the facts or circumstances, on being

(1) 22 L. R. Ir. 504.

(2) *Ib.* 98.

(3) 22 L. R. Ir. 500.

(4) 28 L. R. I. 440.

examined, show that there is a probability of a breach of the peace, or of misbehaviour. The proceeding is not of a punitive but of a preventive and precautionary character. See the passage I have quoted in *The Queen v. Justices of Londonderry* (1), at the top of page 445, from the Chief Baron's judgment in *Tanner's Case* (2). Mark the expression "jurisdiction attaches"; this evidently means that jurisdiction *in such a case* is a matter dependent on the existence of a certain state of facts or circumstances, or evidence of the existence of such facts or circumstances; and the expression "attaches" involves that the facts are gone into; that the establishment by evidence of a certain state of facts or circumstances is a condition precedent to jurisdiction, and that jurisdiction does not depend merely upon what Lord Denman styled in *The Queen v. Bolton* (3) the *nature of the charge*.

I might also refer to the passage I quoted in the *Londonderry Case*, pp. 445, 446, from Lord Fitzgerald's judgment in *The Queen (Feehan) v. The Justices of The Queen's County* (4). I also refer to Lord Justice Holmes's judgment in the *Londonderry Case* (1), and to the view taken by the Lord Chief Baron and my brother Gibson in the present case, with reference to the question of binding to the peace, or compelling sureties for good behaviour.

PALLES, C.B. :—

I agree with the Lord Chief Justice that this application for a writ of *certiorari* must be refused. My reasons, however, differ from those of the Chief Justice.

The conviction sought to be brought up was for using a certain shop for the purpose of betting with persons resorting thereto; and the ground of impeachment relied upon is, that there was no evidence before the convicting Justice of this offence. The decision of the House of Lords, in *Powell v. The Kempton Park Racecourse Company* (5), shows conclusively that this ground of impeachment is true in fact; that, in fact, the evidence given before the Justice was insufficient to bring home guilt to the

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(1) 28 L. R. I. 440.

(3) 1 Q. B. 66.

(2) Judgments of Superior Courts,
Ireland, 340.

(4) 10 L. R. Ir. 294.

(5) [1899] App. Cas. 143.

K. B. Div. 1910. *prosecutor.* This was admitted by Mr. Serjeant O'Brien, who appeared for the Crown. The question, therefore, is whether, if the proceedings were brought up to this Court by *certiorari*, the evidence would be examinable by us, so as to give us jurisdiction to quash the conviction by reason of the insufficiency of that evidence.

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The procedure under which the conviction was had was that prescribed by the "Act for Improving the Dublin Police" (5 Vict. Sess. 2, c. 24). The 72nd section of this Act authorizes the conviction being drawn up in a form which not only does not set out the evidence (as previously had been necessary under 3 Geo. 4, c. 23, s. 1), but makes no reference, either to the fact of evidence having been given, or to a confession by the accused. The actual conviction, however, unnecessarily states that it is made "upon the oath of David White and others, credible witnesses," but it does not otherwise refer to the depositions.

Further (and this, I may remark, is in my opinion the turning-point of the case), although, as a matter of fact, the evidence was reduced to depositions, which were signed by the witnesses and by the Justice, the statute does not impose upon the Justice the obligation to take depositions or to take or sign any note of the evidence.

The case is, therefore, one in which the particulars of the evidence are neither set out upon, nor referred to in, the conviction; nor do they appear upon the records of the Court, and therefore, as was held in the case in Lofft's Reports (p. 348), referred to by Serjeant O'Brien, would not be brought up by the *certiorari*.

In support of the application, Mr. Ronan, for the prosecutor, relied upon the familiar doctrine, that, although the decision of a Justice upon a matter of fact is conclusive, it is otherwise with his decision on a matter of law; and it is interesting that in support of that proposition (which I should have thought was now so settled as not to require any authority), he was able to refer us to a case decided as far back as the second year of the reign of James II: *The King v. Plowright* (1). From this he argued that, as the question whether there is any evidence is undoubtedly a question of law, the decision of the Justice here, that there was

evidence, was not conclusive. As to this, I agree with Mr. Ronan ; *K. B. Div.*
 but this is not sufficient to determine the question here. The real *1910.*
 question is, whether, having regard to the procedure prescribed *THE KING.*
 by the 5 Vict. Sess. 2, c. 24, the prosecutor is at liberty to show *(MARTIN)*
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Mr. Ronan next referred to *The Queen v. The Justices of Londonderry* (1), in which this Court, following what the Lord Chief Justice stated he found to be "the settled, stereotyped practice of this Court in such cases," quashed on *certiorari*, on the ground of the insufficiency of the evidence to sustain it, an order of Justices to find sureties to keep the peace and be of good behaviour. *Palles, C.B.*

This decision (in which it is almost pedantry for me to say I fully concur) does not touch the question here. Its *ratio decidendi* was the anomalous nature of the procedure in this country in relation to compelling such sureties to be found—a procedure according to which the person sought to be compelled to provide sureties is not permitted to produce witnesses to contradict the case made against him.

Cases in reference to authority to convict on view were referred to, but are not, I think, material here ; and then many well-known authorities, from the *Queen v. Vipont* (2) to the *King v. Smith* (3), were mentioned, to show that which I regard as incapable of being doubted, viz., that where a Justice, in a case in which he has jurisdiction to inquire, convicts without evidence of guilt, the defect is more than one of procedure ; that it goes to his jurisdiction, and renders his decision null, and liable to be quashed on *certiorari*, in a case where the evidence is examinable by the King's Bench. I refrain from considering these cases in detail ; because, as I have already stated, the question here is not whether the Justice has acted without jurisdiction, but whether the prosecutor is at liberty to show that he has so acted.

The Lord Chief Justice has drawn a distinction between a case which he calls a case of absence of jurisdiction and a conviction which is bad upon its face, and therefore liable to be quashed upon *certiorari* by the King's Bench. I desire to state

(1) 28 L. R. Ir. 440.

(2) 2 Burr. 1163.

(3) 8 T. R. 588.

K. B. Dir. 1910. that as *certiorari* undoubtedly lies where a conviction is bad upon its face, and as the jurisdiction of the King's Bench to bring up and quash on *certiorari* a record from an inferior Court is limited to cases of want of jurisdiction, a conviction bad on its face is undoubtedly one made without jurisdiction, and in my judgment in *Heaphy's Case* (1), (pp. 512-514) many authorities will be found, from the time of Lord Holt, to establish that proposition.

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Mr. Ronan next referred to an observation made by the late Lord Justice Lush in *Oswood v. Nelson* (2), to the effect that the decision in *The Queen v. Bolton* (3) supposed that evidence was given that supported the charge—a view which appears from *Ex parte Vaughan* (4) to have been shared by Lord Chief Justice Cockburn, Mr. Justice Mellor, and Mr. Justice Shee.

These opinions (which are identical with that which I expressed and acted upon in *Sullivan's Case* (5) and *Heaphy's Case* (1)) were given in relation to a case (*The Queen v. Bolton* (3)) which differs from the present by being one in which the common law obligation on the Justice existed to its full extent, unaffected by statute which rendered impossible the use of any such form as that prescribed by the statute of 5 Vict. Sess. 2, c. 24, s. 72.

Lastly, Mr. Ronan referred to *Bailey's Case* (6), *Baker's Case* (7), *In re Sullivan* (5), *In re Heaphy* (1); and the decision of the late Lord Chief Justice of England, and the late Lord Brampton, in *In re Authers* (8).

I have stated at some length in my judgment in *In re Sullivan* (5), my view of *Bailey's Case* (6) and *Baker's Case* (7), and after full consideration I see no reason to alter or qualify that statement; but the statute 4 Geo. 4, c. 34, under which the adjudications there in question were issued, did not prescribe any particular form of conviction, and therefore in those cases the common law had to be followed in all its rigour.

In re Sullivan (5) and *In re Heaphy* (1) were decisions to which I was myself a party; and, as to them, I desire to say

(1) 22 L. R. Ir., 500.

(2) 10 B. & S., at p. 159.

(3) 1 Q. B. 66.

(4) L. R. 2 Q. B. 114.

(5) 22 L. R. Ir. 98.

(6) 3 E. & B. 607.

(7) 2 H. & N. 219.

(8) 22 Q. B. D. 345.

nothing except that which is absolutely unavoidable. They decided two broad propositions: viz. (1) that at the common law a Justice had no jurisdiction to convict an accused of a criminal offence in the absence of evidence of his guilt; (2), that, as the statute law stood at the time those judgments were pronounced, there was no enactment which prevented the absence of evidence of the guilt of the prisoners, whom we there ordered to be discharged, being shown to the Court in support of their application to be discharged on *habeas corpus*.

Were the offence charged in the present case identical with that of which the prisoners there were convicted, I should not have said one word as to the reasoning by which those two propositions were arrived at. But as that is not so, as it is the duty of the Court here to consider the application of that reasoning to a different subject-matter, I desire to call attention to, and to correct, an inaccuracy of detail, which, although immaterial to the cases then before the Court, would, if not corrected, be material here, where it is sought to rely on a judgment as to the effect of one statute, as an authority on the effect of another of a wholly different frame.

In *In re Sullivan* (1) I called attention (p. 114) to the necessity of contrasting section 11 of the Petty Sessions Act, which related to the mode of taking evidence in the cases then before the Court, with section 20, sub-section 4, of the same Act, which referred to the mode of taking evidence in cases of offences punishable upon summary conviction. That sub-section is in these words:—

“Whenever any Justice shall proceed to hear and determine any complaint or information as to an offence, they, or one of them, shall, when required so to do by either party or his agent, take or cause to be taken a note in writing of the evidence, or of so much thereof as shall be material, in a book to be kept for that purpose by the Clerk of Petty Sessions, and which book shall be signed by one of the Justices by whom such information or complaint shall have been heard on the day on which the same shall have been determined.”

Later on, in the same judgment, I expressed the opinion I had

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(1) 22 L. K. Ir. 98.

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formed as to the true effect of the Act (1), which I held was "to make changes in matters of form and procedure only, and not to touch constitutional rights previously existing in the subject"; that if, before that statute, "a conviction (which should upon its face set forth all the evidence) was capable of being quashed on *certiorari* when the evidence was insufficient to warrant it, the same right, viz., the right of the suitor to appeal to the Queen's Bench to keep the inferior tribunal within the limits of its authority, continued to exist after the statute."

I did not, however, knit in, or closely connect with, this opinion on the general construction of the Act the sub-section I had previously referred to, which provided the machinery by which effect was to be given to the right which I was of opinion was intended to be preserved. This was an unfortunate omission, because, not advertng for the moment to the sub-section, I proceeded to say that as the evidence was not set out on the conviction, it must be supplied by "affidavit or other evidence extrinsic to the conviction." This is inaccurate. The statute itself provides the evidence in the recorded note in writing which the sub-section I have referred to requires the Justice, on request, to take and sign.

These cases of *In re Sullivan* (2) and *In re Heaphy* (3) do not, then, assist Mr. Ronan here. They are differentiated from the present case by the distinction between the provisions of the Criminal Law and Procedure Act and the Petty Sessions Act, which were in point there; and those of the Dublin Police Act, upon which the present case must be determined. In the former cases the evidence was, and in the present case it is not, on the records of the inferior court, as part of the proceedings from which the conviction ensued.

There remains only *In re Authers* (4). It merely followed *In re Baker* (5); and it did so, apparently, without the form of the conviction, which is not even stated in the report, being considered, either at the Bar or on the Bench. The application there

(1) 14 & 15 Vict. c. 93.

(2) 22 L. R. Ir. 98.

(3) 22 L. R. Ir., pp. 512-514.

(4) 22 Q. B. D. 345.

(5) 2 H. & N. 219.

was for a *habeas corpus*, the *certiorari* having been taken away by the Licensing Acts. When, in giving a decision, a material point is overlooked, even if it be by so august a tribunal as the House of Lords, we have the authority of that House itself for not regarding the decision as an authority on the overlooked point.

What I have said up to this clears the case of all the material authorities relied upon for the prosecutor, and brings me to the consideration of the single question upon which, in my opinion, the decision here must depend, viz., the effect of the form of the conviction in relation to our jurisdiction to examine the evidence; for, unless we can, we undoubtedly cannot quash the conviction. As to this, there is a long line of authority to which my brother Dodd has referred me, which shows the inability of this Court to go behind the return to a *certiorari* in order to ascertain accurately the evidence actually given. Of these I may mention *Rex v. Hartley* (1); *The King v. Thompson* (2); *The King v. Lovet* (3); *The King v. Clarke* (4), and *The King v. Persse* (5).

From these cases it appears that, in many instances, Justices, in drawing up convictions, instead of stating the evidence in the words of the witnesses, stated that evidence (in the face of the often expressed disapproval of the King's Bench) as having been given in the words of the statute creating the offence; and thus deprived the convicted persons of the possibility of obtaining the opinion of the King's Bench as to its sufficiency. The Court held itself powerless to do anything on *certiorari* to prevent the practice; and intimated that they could not interfere, save by permitting a criminal information to be filed, if the practice were persevered in wilfully to prevent justice being done. One object of the Act 3 Geo. 4, c. 23, directing the conviction to set out the evidence as nearly as possible in the words used by the witness, was to put a stop to this practice.

This line of authority shows, to my mind, that at common law the evidence capable of being examined by the King's Bench on *certiorari*, in a case in which the evidence actually given was

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(1) Cald. 175.

(2) 2 T. R. 18.

(3) 7 T. R. 152.

(4) 8 T. R. 222.

(5) 9 East, 385.

K. B. Div. not identical with that recorded as having been given, was the
 1910. latter. Were there no evidence recorded in a case in which there
 THE KING was a statutable obligation to record it, no doubt the conviction
 (MARTIN) was liable to be quashed; but it would have been so quashed, not
 v. upon an examination of the evidence extrinsically proved to have
 MAHONY. been given, but because the Justice had not proceeded *recto ordine*.
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I am, therefore, of opinion that where a statute authorizes a form of conviction which does not state or refer to the evidence upon which it is founded, and does not impose an obligation upon the Justice to record it, such evidence is not examinable upon *certiorari*. That is the present case; and, consequently, I am of opinion that the writ should be refused.

As to this question—the only one regularly before us—I believe there is no difference of opinion upon the Bench; but as it is the desire of the Court that we should express an opinion upon another question, which, I believe, not one of us holds to arise, or to be within our jurisdiction to decide, I mean, whether the decision of the Queen's Bench in *The Queen v. Sullivan* (1) was correct, I bow to that desire; but I do so without expressing any opinion upon the regularity or effect of such a proceeding. In doing so I desire to say that I have carefully considered all the cases cited at the Bar, and very many others, including all or nearly all of those referred to in the judgment of my brother Gibson, of which I shall mention one only, *The Queen v. Chantrell* (2), which, perhaps more pointedly than any other case, emphasizes the distinction upon which I relied in *In re Heaphy* (3), in regard to the examinability of evidence, between procedures in which the right to the *certiorari* has been, and has not been, taken away by statute. In this examination I have failed to find a single decision prior to *The Queen v. Sullivan* (1) which (having regard to the above distinction, and the further distinction that Jervis's Act in England does not, as does our Petty Sessions Act, by sect. 20, sub-s. 4, impose any obligation upon a Justice to record the evidence) leads to or supports the decision in *The Queen v. Sullivan* (1). Without, then, repeating at length what I said in *In re Sullivan* (4) and *In re Heaphy* (3), which

(1) 22 L. R. Ir., 504, note. (2) L. R. 10 Q. B. 587. (3) 22 L. R. Ir. 500.

(4) 22 L. R. Ir. 98.

I modify only in the immaterial matter to which I have referred, *K. B. Div.* but fortified, as I believe myself to be, by the opinions of Lord 1910.
Campbell, C.J. (1), Wightman, J. (2), and Erle, J. (2) (afterwards *THE KING*
Chief Justice), in *Bailey's Case* (3); of Pollock, C.B. (4); and *(MARTIN)*
Watson, B. (5), in *Baker's Case* (6); of Lord Blackburn, *v.*
in *Pease v. Chaytor* (7); of Cockburn, C.J., in *Ex parte* *MAHONY.*
Vaughan (8); of Lush, L.J., in *Oswood v. Nelson* (9); and of *Palles, C.B.*
Mellor and Shee, J.J., in *Ex parte Vaughan* (8), I continue to
be of the opinion that the decisions of the late Exchequer Division
in *In re Sullivan* (10), and *In re Heaphy* (11), were right; and that,
consequently, the judgment of the Queen's Bench in *The Queen v.*
Sullivan (12) is not law.

GIBSON, J. :—

When this argument opened, I thought that, as I had stated
in *De Vesci's Case* (13), *Brittain v. Kinnaird* (14) and *Reg. v.*
Bolton (15) had been misunderstood, and that the explanation
given of those cases by the Lord Chief Baron in 1888 was correct.
Examination of a long line of authorities and of the legal
principles involved has, however, convinced me that my view was
erroneous, though I have no doubt that my actual decision in
De Vesci's Case (13) was right.

This prosecution was under the Dublin Acts, not the Petty
Sessions Act, in respect of an offence created by the Betting
House Act, 1853; but the case has been argued on the broad
question, applicable to all our summary jurisdiction procedure,
whether the view of the Queen's Bench or that of the Lord Chief
Baron, in reference to examining evidence, is right and ought to
be followed. During no part of the argument was it suggested
by any of the Judges that the Petty Sessions Act was not to be

(1) 3 E. & B. 618.

(2) *Ibid.*, p. 619.

(3) *Ibid.*, p. 607.

(4) 2 H. & N. 230 and 249.

(5) *Ibid.*, p. 234.

(6) *Ibid.*, p. 219.

(7) 3 B. & S. 641.

(8) L. R. 2 Q. B. 114.

(9) 10 B. & S. 159.

(10) 22 L. R. 1r. 98.

(11) 22 L. R. Ir., p. 500.

(12) 22 L. R. Ir. 504, note.

(13) [1908] 2 Ir., at p. 305.

(14) 1 Br. & B. 432.

(15) 1 Q. B. 66.

K. B. Div. considered, and, indeed, most of the discussion was addressed to 1910. that statute.

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The conviction here is on its face admitted to be sufficient; but on the depositions, if the Court could look at them, though the shop was used by the defendant for betting purposes, there was no evidence that he occupied or used it as the basis of a betting business carried on by him.

Whether the magistrate misconstrued the enactment as extending to persons using the shop as members of the betting public (of which supposed offence there would have been evidence), or whether he held that the evidence proved the true statutory offence, his decision was wrong in law, and must have been reversed on case stated. No statute has given rise to greater conflict of judicial opinion; though the words "place" and "use" appear simple, their simplicity is delusive. The remark in *Sullivan's Case* (1), that no Court has jurisdiction to act without evidence, is a hard saying. Every Court which has jurisdiction to determine any matter of law has jurisdiction to err, and such error can only be corrected in accordance with settled rules of legal procedure. Whether there is sufficient evidence or not is often a question of extreme difficulty. *Slattery's Case* (2) and *Maconchy v. Trower* (3) are striking examples. If Justices have no jurisdiction as to law, save where they go right, and if any determination of theirs, erroneous in law, is intrinsically void as being without jurisdiction, as *Heaphy's Case* (4) seems to decide, the summary jurisdiction provided by the Legislature is unintelligible, for it could hardly have been supposed that, alone among earthly tribunals, Justices were gifted with infallibility.

The statutory qualification of Dublin police magistrates is six years' standing at the Bar; that of resident magistrates under the Crimes Act, sufficiency of legal knowledge to the satisfaction of the Lord Lieutenant. If this means that such magistrates have no jurisdiction at all to decide law, or that, if they have it, they lose it when they err, the legislation would seem a piece of misleading and malicious pleasantry.

(1) 22 L. R. at p. 136.

(2) 3 App. C. 1155.

(3) [1894] 2 Ir. 663.

(4) 22 L. R. Ir. at p. 515.

In many cases, some mentioned later on, the question of evidence depends on how the statute is construed. An offence involving *mens rea*, if construed as not including that element, might, on that erroneous view, be abundantly proved, though there might be no proof of the real statutory offence. Whether the error is in interpreting the statute, or as to the sufficiency of proof, the legal result is the same.

The inconvenience and danger of limiting the authority of Justices to questions of fact is obvious. Where there is an appeal, or case stated, execution is suspended. In *certiorari*, there was in Ireland no statutory period of limitation, so that, if no appeal was brought, the conviction or order might be executed without the magistrate or complainant being aware of any intention to impeach it, with the result that the magistrate might be exposed to an action of trespass: *Barton v. Bricknell* (1). An offence might depend on many links of proof. From oversight and without objection, a minor but necessary link which could have been proved might be omitted, or might be proved by evidence which this Court might deem inadmissible. To hold that such omission or mistake could destroy jurisdiction would be to impose on Justices an intolerable and unfair burthen that no Superior Court would undertake to bear.

If an adjudication is void whenever there is latent error of law, this must apply to a successful defendant as well as to a complainant. In many cases stated the facts are not in dispute (as in the structural separation case, *Toppin v. Coleman* (2)), but the Justices, misconstruing the statute, erroneously decide that the offence is not proved. Every case on this principle may be retried on *certiorari*, in search for latent error, though there may be no authentic record of the evidence or grounds of decision in the Court below, and though there are appropriate modes of appeal provided to revise errors of law, to which modes, for the protection of magistrates and others, the statutes have attached special restrictive conditions.

It is admitted that where *certiorari* is prohibited, or Quarter Sessions is concerned, an adjudication on the legal merits, good

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(1) 13 Q. B. 393.

(2) [1910] 2 I. R. 200.

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on its face, is not examinable. Many, if not most, of the statutes giving summary jurisdiction to be found in Nunn and Walsh exclude *certiorari*. So do the General Clauses Acts, 1845, the Dublin Police Code, the Summary Jurisdiction Act, consolidating statutes, such as the Licensing and Public Health Acts. The practical operation of the principle now involved, described in argument as constitutional and fundamental, is therefore of a restricted and somewhat fortuitous character. Looking at the history of legislation, I find it hard to suppose that no-*certiorari* clauses were devised or introduced to validate intrinsically void adjudications, and to confer jurisdiction, which, but for them, would not exist. *Heaphy's Case* (1) attributes to them this effect. That a conviction for conspiracy under the Act of 1875 should be void in Belfast and allow *habeas corpus* and *certiorari*, being under the Petty Sessions Act, and should be valid and exclude *habeas corpus* and *certiorari* in Dublin, under the Dublin Code, if it takes away *certiorari*, seems irrational. Rights should not depend on the accident of place of prosecution.

The argument before us has covered a wide range of topics, many of which I do not propose to discuss; such as *certiorari* as applicable to the quasi-judicial action of administrative bodies, like the Local Government Board or Education Department, or Licensing Authorities, to which different considerations may apply. In such cases, where there is no proper *lis inter partes*, it may well be that *certiorari* (which in its application is moulded by the practice and course of the Court) may not be governed by the strict rule of *Reg. v. Bolton* (2). Indeed, until *Rex v. Woodhouse* (3), I was not aware that the rule was ever supposed to extend to licensing cases, and many cases in England and Ireland might, I think, be found inconsistent with the application of *Reg. v. Bolton* (2), both as to *certiorari* and *mandamus*: Shortt, p. 319. In such cases *Reg. v. Bolton* (2) was not discussed or considered. They are of no value in the present problem; they either represent a type of case outside *Reg. v. Bolton* (2) (which is my opinion), or if in conflict with that decision, and with the unbroken chain of authorities since on the same lines, they were decided in oversight and

(1) 22 L. R. Ir., p. 515.

(2) 1 Q. B. 66.

(3) [1906] 2 K. B. 501.

cannot be taken to over-rule them: *Reg. v. Blaney* (1); *Kydd's Case* (2). The difference between Justices' *certiorari* and other *certiorari* is illustrated by the fact that in England by statute, and in Ireland by rule, a special period of limitation is prescribed for the former. So also in administrative statutes, such as the Licensing Act, no-*certiorari* is restricted to judicial decisions proper.

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My judgment is confined to the following question:—Is *certiorari* applicable to a decision on the legal merits, civil or criminal, on its face valid, within the general jurisdiction of Justices sitting as a Court of Record? I shall say something later on with reference to abuse of jurisdiction or violation of conditions regulating the mode of exercising jurisdiction, but in the present case there is nothing of the kind. I shall discuss (i) the general principle underlying the problem; (ii) the meaning and effect of *Brittain v. Kinnaird* (3) and *Reg. v. Bolton* (4), as understood and accepted in all subsequent cases; (iii) the capacity of Justices to decide law; (iv) the scope of no-*certiorari* clauses; (v) the alleged distinction between Quarter Sessions and Petty Sessions as regards erroneous decisions on legal merits; (vi) the few cases relied upon by both sides as supposed to be direct authorities.

I. *Certiorari* lies (a) where there is want or excess of jurisdiction when the inquiry begins or during its progress; (b) when in the exercise of jurisdiction there is error on the face of the adjudication; (c) where there has been abuse of jurisdiction (as by mis-stating the complaint, &c., or disregard of the essentials of justice and the conditions regulating the functions and duty of the tribunal); (d) where the Court is shown to be disqualified by likelihood of bias or by interest; (e) where there is fraud. Much of the difficulty that has arisen has been caused by describing what is essentially error as excess of jurisdiction. In a sense it is; it nullifies the adjudication: *Brisby's Case* (5). But such result no more shows that Justices have no jurisdiction to decide law than in the case of Quarter Sessions, who admittedly have such

(1) [1901] 2 I. R., at pp. 103, 104.

(4) 1 Q. B. 66.

(2) [1908] A. C., at p. 330.

(5) 1 Den. C. C. 416.

(3) 1 Br. & B. 432.

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power, but whose adjudication, if erroneous on its face, is equally void and liable to be quashed. A conviction or order of Petty Sessions or Quarter Sessions, bad on the view, is quashed, not because there was no jurisdiction to determine, but because determination is manifestly vitiated by error: *The Walsall Case* (1).

The general law as to summary jurisdiction was that, such jurisdiction being against common right, the limited authority must be shown to be strictly followed, and the adjudication must show jurisdiction and a due exercise of jurisdiction. I confine the inquiry to legal merits, that is, evidence, conviction or order, and judgment. Unless the particular statute creating the offence otherwise directed, it was held that, in order to enable the Court to judge whether the conviction was legal, it must (a) set out the evidence: *R. v. Lloyd* (2); *R. v. Smith* (3); (b) state all the conclusions of fact constituting the offence; (c) give a proper judgment. If the evidence was insufficient, or if, though sufficient, the conviction, like a special verdict, did not find the necessary ingredients of the offence, or if the judgment was wrong, the whole conviction was invalidated by manifest error, just like a judgment on a special verdict: *Reg. v. Chadwick* (4).

Side by side with this rule of law there was another principle, even more fundamental, that the judgment of a competent Court, if valid on its face, could not be examined or impugned for latent error as to the merits. In the Superior Court, error lay only for manifest error in the record; but such erroneous record was, till quashed on writ of error, operative: *Re Blakemore* (5); *Reg. v. Haughton* (6). In the inferior Courts, including Quarter Sessions, the same rule applied as regards legal merits; the error must be apparent; but where there was such error, the consequence was different; the conviction was void, and the Justices were liable in trespass, whether the error was in the insufficiency of the evidence, or in the conviction, or in the judgment: *Gray v. Cookson* (7);

(1) 4 App. C., at p. 39.

(2) 2 Str., at p. 999.

(3) 8 T. R. 588.

(4) 11 Q. B. 205.

(5) 2 Den. C. C. 420.

(6) 1 E. & B. 501.

(7) 16 East, 13.

Day v. King (1); *Newman v. Bendyshe* (2); *Lindsay v. Leigh* (3). *K. B. Div.*
 Hence the party aggrieved, without quashing the conviction, was 1910.
 in a better position than if under the Justices' Protection Act, *THE KING*
 43 Geo. 3, c. 141, the conviction had been quashed. This is *(MARTIN)*
 pointed out in the old books. The reason that the Court *v.*
 required the evidence to be stated was, by making it part of the *MAHONY.*
 record, to bring it within the cognizance of the Court, and enable *Gibson, J.*
 the Court, if the evidence was insufficient, to quash the conviction
 as manifestly erroneous. What was returned on *certiorari* was
 the record of the conviction or order (not the evidence: *Lofft*,
p. 348); if found on perusal erroneous, the record was quashed;
 but the Court never went outside the record to ascertain by
 affidavits what was the evidence actually given, which, in case
 of oral evidence, would have been impossible, and would, if
 evidence outside the record was admissible, make the record
 valueless: *R v. Jukes* (4); *R. v. Liston* (5); *Lofft*, *p. 348*. Hence
 the phrase is, jurisdiction is to be "shown," not jurisdiction is to
 be "proved," which would necessitate trial of the whole merits
de novo.

I cannot find any case in which it was attempted to go behind
 or contradict the evidence so reported and forming part of the
 record, or to traverse the facts found by the conviction or order.
 The Court never turned an apparently good conviction or order
 upside down in order to ransack it from within, and examine into
 evidence or findings in quest of error of law: *Lofft*, *p. 348*.

Judges, disliking or distrusting summary jurisdiction, directed
 their ingenuity to discover faults in evidence and conviction, to
 which they applied methods not merely of demurrer but special
 demurrer: *R. v. Woodcock* (6); *R. v. Smith* (7). Parliament again
 and again intervened to protect magistrates and suitors from this
 dangerous, expensive, and dilatory technicality—(a) by declaring
 convictions, &c., to be "final" or "final and conclusive"; (b)
 by excluding *certiorari*; (c) by prescribing general forms of con-
 viction without evidence. Most of the later summary jurisdiction

(1) 5 A. & E. 359.

(5) 5 T. R., at *p. 341*.

(2) 10 A. & E. 11.

(6) 7 East, 146.

(3) 11 Q. B. 455.

(7) 5 M. & S. 133.

(4) 8 T. R., at *pp. 540, 541*.

K. B. Div. statutes give these special forms, some with appeal and no-*certiorari*,
 1910. some with appeal, not excluding *certiorari*, some few without
 THE KING reference to appeal or *certiorari*. So far as regarded no-*certiorari*
 (MARTIN) and finality clauses (which preceded general forms in order of time),
 v. judicial decisions made them of small effect, but the general forms
 MAHONY. not stating evidence proved to be a successful remedy. There has
 Gibson, J. been no case in England where such a form, complying with the
 statutory requirements, has been quashed for error lying behind it,
 whether insufficiency of evidence or otherwise. In *R. v. Eaton* (1)
 the Court expressly laid down that where there was a general form,
 "the party can have no benefit from a *certiorari*, because the pro-
 ceedings or examinations need not be returned, but the conviction
 only, which, being general, cannot exhibit error on the proceedings."
 This ruling was never departed from.

In *Geswood's Case* (2), Lord Campbell adopts the same view as
 to the object and effect of such general forms as does Cave, J.,
 in *Bradley's Case* (3). Note the use of the word "error" in *R. v.*
Eaton (1), adopted also by Lord Cairns in the *Walsall Case* (4). It
 is incredible that when the use of general forms excluded evidence
 from being available as ground for patent error, latent error as to
 evidence could be used to support *certiorari*, which was never the
 law before, the Court being confined to the evidence as recorded,
 which could not be traversed.

3 Geo. 4, c. 23 (confined to cases where no forms were prescribed),
 simplified the form, but retained the evidence. It was repealed
 by 12 & 13 Vict. c. 70, which substituted general forms without
 evidence, such as were in use under the Dublin Code. Jervis's
 Act and the Petty Sessions Act (which latter replaced 12 & 13
 Vict. c. 70, and applied to civil as well as offence cases) made
 general forms without evidence universal, with the manifest
 object of making convictions and orders expeditious and final,
 subject, in substantial cases, to appeal on fact and law, extended
 by the Case Stated Act to all erroneous determinations; but
 such appeals were guarded by conditions in the interest of finality
 and certainty.

(1) 2 T. R. 285.

(2) 2 E. & B., at p. 954.

(3) 70 L. T. (N. S.), p. 379.

(4) 4 App. Cas., at p. 39.

To construe the Petty Sessions Act as incorporating the evidence, *K. B. Div.* or as enabling it to be used for the purpose of *certiorari*, would be 1910.
 contrary to the spirit and history of the legislation, and would
 leave magistrates and suitors in a worse position than they ever
 were before. Formerly, the conviction orally pronounced was
 amendable even after action: *Ex parte Johnson* (1); and at present
 in England can be amended under 12 & 13 Vict. c. 45, section 7.
 Now, in Ireland, the Order Book, the compendious simple uniform
 record, for civil and criminal cases alike, under the Petty Sessions
 Act (*Rex v. Cork Justices* (2)), once it is signed, is final and
 incapable of alteration: *Rex v. Cork Justices* (3). Again, orders
 never set out the evidence, though they had to state all the facts
 giving jurisdiction: *R. v. Cheshire* (4); *Day v. King* (5). No
 attempt was ever made to challenge the facts so found as un-
 supported by evidence; they were not traversable. On defend-
 ant's argument the evidence is now incorporated, or can be
 examined to upset the order—a revolutionary, reactionary, and
 inconceivable alteration of the previous law, said to be carried
 out by the Order Book directing witnesses' names to be recorded.
 That oral evidence should be so incorporated is contrary to all
 principle.

It is the Lord Chief Baron's view (though this was not argued)
 that the Dublin Summary Jurisdiction Statutes differ, as regards
certiorari, from the Petty Sessions Act. He agrees that, under
 the former, *certiorari* is not available here. Much of my judgment
 is directed against the reasoning in *Sullivan's Case* (6) and *Heaphy's*
Case (7), to the effect that want of evidence was fatal to jurisdic-
 tion; that Justices have no jurisdiction to go wrong in law, and
 that the nullity of the conviction for the above reasons can be
 shown by affidavit, and whether the evidence given was oral or
 not, for which positions *Smith's Case* (8) and *Bailey's Case* (9)
 were there mainly relied on. At the Bar no such distinction
 between the two sets of statutes was attempted, and, with great

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(1) 3 B. & S., at p. 952.

(2) [1907] 2 I. R. 5.

(3) [1905] 2 I. R. 309.

(4) 5 B. & Ad., at p. 442.

(5) 5 A. & E. 359.

(6) 22 L. R. Ir. 98.

(7) 22 L. R. Ir., p. 500.

(8) 8 T. R. 588.

(9) 3 E. & B. 607.

K. B. Div. deference, I think that no such distinction exists. It would be
1910. counter to the whole history and policy of the legislation.

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The directory provision in the order book as to naming witnesses cannot incorporate evidence in civil cases, or oral testimony ; and as the same identical form of record is applicable to civil and offence complaints, it would seem that this provision cannot *per se* incorporate evidence in offence cases. The Dublin statutes contain no such direction as to names ; it could hardly have been intended thereby to create a radical difference between the two jurisdictions.

The point, however, mainly now relied on is section 20, subsection 4, of the Petty Sessions Act, requiring a note of evidence in offence cases to be taken if asked for. This enactment is copied, I find, from 6 & 7 Wm. 4, c. 34, sect. 2. The argument founded on this statute is extremely strong against the note being incorporated, or available on *certiorari*. When it was passed, 3 Geo. 4, c. 23, was in force, by which the conviction signed by the Justices recorded the evidence. The statute was not repealed till the Petty Sessions Act, and is expressly recognized as operative by 12 & 13 Vict. c. 70, sect. 37. As 12 & 13 Vict. c. 70 expressly prescribes a general form without evidence, it would seem that the note taken under 6 & 7 Wm. 4, c. 34, sect. 2, could not have formed part of the record. If it did, it would make the general statutory form illusory, and its meaning or effect would fluctuate according as a note was or was not taken. The same principle must apply to the Petty Sessions Act.

But, apart from this special argument, which has occurred to me just before giving judgment, and which seems to me difficult to answer, I think that, taking the Petty Sessions Act by itself without any historical context, the note cannot be incorporated in the record. It is not signed by the witness ; could not be used as primary evidence on appeal or otherwise ; if the note was admitted or proved to be incorrect, it could be contradicted or corrected, which evidence expressly made part of the record under the old system could not have been. The note, which is only to be of material evidence, is to be entered in a book not the order book, and not referred to in the order book ; though signed by one Justice, it might not be read by the other

Justices, who might find its inaccuracy later on, and who might prove that fact if examined on appeal. Such note differs altogether from the evidence set out in such a case as *R. v. Smith*, (1), where the conviction was signed and sealed by the Justices who collectively authenticated the evidence as part of the record. The note is collateral to the record, and is not incorporated or available for *certiorari*. I can find no case when such note was used to upset a conviction. The manifest object of the provision was as a check on magistrates and witnesses, and with a view to appeal. *Certiorari* cannot depend on the accident of a note having been asked for or not. That such note when taken should be available as part of the record or otherwise to found *certiorari*, would be quite contrary to the whole trend of legislation. Again, why should there be an essential difference of rights under the two analogous codes? I cannot understand, as already observed, why a conviction should be quashed if happening in Belfast or Cork, and the same conviction should be unimpeachable if made in Dublin. Both sets of enactments, the Dublin and Petty Sessions Acts, are Summary Jurisdiction Acts within the statutory definition. Had the Legislature intended again to impose on Justices and litigants the burthen of technicality which it had been so long seeking to exclude, it would have used clear language to give effect to that strange purpose—a purpose which appears unintelligible in face of the immediately preceding statute, 12 & 13 Vict. c. 70. There is in my judgment no substantial difference, so far as *certiorari* is concerned, between the two sets of Summary Jurisdiction Acts. Indeed, in one respect the Dublin Act, 5 & 6 Vict. c. 24, is more stringent than the Petty Sessions Act, as section 70 appears expressly to make evidence on oath a condition to jurisdiction. The conviction before us follows the form in 1 Vict. c. 25; it refers to the witnesses, naming one, and is based on signed depositions, much more authentic and more closely connected with the record by reference than is the magistrates' note under the Petty Sessions Act.

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THE KING (MARTIN) v. MAHONY. In the former case the conviction was under 2 Geo. 3, c. 28 (relating to bum-boats and other boats), which gave a general form of conviction, not stating evidence, and took away *certiorari*.

Gibson, J. The conviction was in the statutory form, and described the ship seized (which was a decked and registered vessel of 15 tons) as a boat, the statute being misconstrued to apply to such vessel as being a boat. The Court held the conviction conclusive in an action against the magistrates. No reliance was placed on the no-*certiorari* clause, nor was it suggested that such clause gave any jurisdiction to misinterpret the statute. Had the conviction incorporated the evidence, or had it stated the nature of the vessel, it would have been bad on its face, would not have been protected by the no-*certiorari* section, and the magistrates would have been liable in trespass.

Suppose the conviction could have been, and was, quashed, what would have been the position of the magistrates and suitors respectively (1) before the Justices' Protection Act, 43 Geo. 3, c. 141; (2) after that statute; (3) under our present Justices' Protection Act? The error being not of fact, but one of law, misconstruing the statute so as to make it apply to an innocent man, *Pease v. Chaytor* (3), might not protect; and to the extent that the erroneous conviction was acted on, the Justices might have been made liable in trespass or otherwise: *Barton v. Bricknell* (4). The protection supposed to be given by *Brittain v. Kinnaird* (1) would thus disappear, or would be much restricted. Suppose the vessel seized had been a large liner or a man-of-war, as was put in the judgment, what view would a jury have taken of the magistrates' conduct, and of the damages? *Brittain v. Kinnaird* (1) has never been questioned: see *Mould v. Williams* (5); *Cave v. Mountain* (6). It seems to fall clearly within the rule stated in *R. v. Eaton* (7).

(1) 1 Br. & B. 432.

(2) 1 Q. B. 66.

(3) 3 B. & S., pp. 644, 639.

(4) 13 Q. B. 393.

(5) 5 Q. B. 469.

(6) 1 M. & G. 257.

(7) 2 T. R. 285.

In *Reg. v. Bolton* (1) (where *certiorari* was not excluded), *K. B. Div.* 1910. though there was sufficient evidence to support the order, Lord Denman's main *ratio decidendi* was that *Brittain v. THE KING (MARTIN)* *Kinnaird* (2) and *Cave v. Mountain* (3) applied to *certiorari*. *v. MAHONY.* He dealt with two points: (1) Could affidavits as to legal merits be used at all? (2) If they could, was there evidence to support the order? (see p. 71). He cites in italics the passage from *Cave v. Mountain* (3) that jurisdiction is not affected by insufficiency of evidence. Lord Denman's references to *Brittain v. Kinnaird* (2) and *Cave v. Mountain* (3) are absolutely irrelevant and misleading if affidavits were admissible to prove insufficiency of evidence. Lord Denman decided both points adversely to the applicant. The second point was one of fact, not involving any legal principle. The first point was that to which his canon for future guidance was applied; it raised a pure question of law as to which his answer was in the negative. What he meant is demonstrated by what he said in other cases, such as *Re Clarke* (4), (where the order under review was that of an inferior Court, within *Christie v. Unicorn* (5)), and *Reg. v. Buckinghamshire* (6) (where *Bolton's Case* (1) is expressly applied to a case of there being no sufficient evidence). It was always so understood. The well-known passage in *Bunbury v. Fuller* (7) states that the decision of an inferior Court, though not final as to points collateral to merits, "is final in all particulars making up together that subject-matter which, if true, is within its jurisdiction." As the proposition has been controverted as applying to the cases where the legal merits represent matters of law, I append cases covering the period since *Reg. v. Bolton* (1): *Reg. v. Grant* (8); *Thompson v. Ingham* (9); *Reg. v. Wood* (10); *Reg. v. Badger* (11); *Flannagan's Case* (12) (where there being no evidence of the statutory offence, Lord Campbell,

(1) 1 Q. B. 66.

(2) 1 Br. & B. 432.

(3) 1 M. & G. 257.

(4) 2 Q. B. 624.

(5) 11 A. & E. 373.

(6) 3 Q. B. 800.

(7) 9 Ex., at p. 140.

(8) 14 Q. B., at p. 62.

(9) 14 Q. B., at p. 718.

(10) 5 E. & B., at p. 56.

(11) 6 E. & B., at p. 167.

(12) 8 E. & B., at p. 455.

K. B. Div. in reference to a general form of conviction not excluding *certiorari*, expressly states that but for the Case Stated Act the defendant would have been without remedy); *Reg. v. St. Olaves* (1); *Reg. v. Russell* (2), with Mr. Mellish's and Mr. Chambers's argument, pp. 111 to 113; *Re Thompson* (3); *Usill v. Hales* (4); *Huxley's Case* (5); *Willan's Case* (6); *Reg. v. Farmer* (7); *R. v. Woodhouse* (8) (where there was no evidence to justify the adjudication). The value of this last case is not the actual decision, but the view taken by all the Judges as to the effect of *Bolton's Case* (9) and *Willan's Case* (6). The article on *certiorari* in the Encyclopædia of the Laws of England, p. 625, adopts the same interpretation. The above cases show that an apparently regular adjudication on the merits by Justices in a case within their jurisdiction is conclusive as to all matters involved in the adjudication, though the record conceals an erroneous view of law, as in *Brittain v. Kinnaird* (10) or as in *Flannagan's Case* (11), or as in the case put by Erle, J., in *Reg. v. Wood* (12). "Conclusive" cannot in the above authorities bear the futile and misleading meaning, "conclusive only when the Justices go right in law," or "conclusive unless found not to be so."

The reference in the above authorities to *Brittain v. Kinnaird* (10) as applicable to *certiorari* appears to exclude any possibility of doubt as to what is meant. In some cases—for example, *Vaughan's Case* (13), commented on by my Lord—the Court adverted to the fact of there being evidence, just as Lord Denman did in *Bolton's Case* (9) in reference to the second point discussed by him; but no case can be found where a decision on the merits has been quashed for want of evidence, while there is case after case the other way.

III. The argument that Justices have only authority to deal with facts, not law, is met by the above authorities, to which I

(1) 8 E. & B., at p. 533.

(2) 10 B. & S., at p. 117.

(3) 6 H. & N., at p. 200.

(4) 3 C. P. D., at p. 324.

(5) 17 Q. B. D., at p. 378.

(6) L. R. 5 P. C. 417.

(7) [1892] 1 Q. B. 637.

(8) [1906] 2 K. B. 501.

(9) 1 Q. B. 66.

(10) 1 Br. & B. 432.

(11) 8 E. & B., at p. 455.

(12) 5 E. & B., at p. 56.

(13) L. R. 2 Q. B. 114.

add *Ashcroft v. Bourne* (1), where the decision was founded on a plain mistake of law; see p. 688. Such an idea is contrary to the settled law of mandamus: *Reg. v. Leicestershire* (2); *Reg. v. Dayman* (3); *Reg. v. Brown* (4); *Reg. v. Cotham* (5). In *Reg. v. Lundie* (6), Crompton, J. (correcting his judgment in *Reg. v. Wood* (7)), expressly says that Justices decide the law and the fact. They must clearly decide as to the admissibility of evidence: *Reg. v. Marsham* (8). The Case Stated Act and Summary Jurisdiction Act, 1879, section 33, assume that Justices have jurisdiction to determine law erroneously; so does the Justices' Protection Act, section 5. See also the Criminal Justice Act, 1885, and Summary Jurisdiction Act, 1879, sections 11 and 12. Nor does prohibition lie for misconstruction of a statute as to the merits, or for want of evidence: *Denaby v. Manchester Railway Company* (9).

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Such an adjudication on the merits as above described is final unless discharged in the manner provided by law, and this Court has no authority to go beneath the record, which, as *res judicata*, binds the parties.

R. v. Plowright (10) and *R. v. Moreley* (11) were relied on as authorities to prove that Justices could only determine questions of pure fact. They are quite irrelevant. They relate to finality clauses, which do not exclude *certiorari* where there is an apparent error in law. If they have any larger meaning, they are opposed to all modern authority.

But though a decision cannot, as regards legal merits, be examined, still under special circumstances the Court can quash. One case is that put by Lord Denman, viz., where the charge is misdescribed. *Reg. v. Cork Justices* (12) and *Reg. v. Rawson* (13) are examples of this. A proper charge is of course a condition of jurisdiction: *Reg. v. Cork Justices* (12). Again, the writ lies

(1) 3 B. & Ad. 684.

(2) 15 Q. B. 671.

(3) 7 E. & B., pp. 678, 679.

(4) 7 E. & B. 757.

(5) [1898] 1 Q. B., at p. 806.

(6) 31 L. J. (N. S.), M. C. at p. 160.

(7) 5 E. & B. 49.

(8) [1892] 1 Q. B. 378.

(9) 3 N. & M. Ry. C. 426.

(10) 3 Mod. 95.

(11) 2 Burr. 1040.

(12) [1898] 2 I. R. 694.

(13) [1909] 2 K. B. 748.

K. B. Div. where the essentials of justice have been disregarded. If a defendant is not summoned and does not appear, the adjudication is invalid. So it is, if defendant, though present, is not allowed to call witnesses: *Reg. v. Russell* (1), *per Cockburn, C.J.*; *Reg. v. Morris* (2); *Reg. v. Marsham* (3); *Lort v. Hutton* (4), *per Blackburn, J.*, during the argument. These examples relate to a defendant. The principle equally applies to the complainant. Jervis's Act, the Petty Sessions Act, and the Dublin Acts all in mandatory terms require the evidence on both sides to be heard. It would be a gross violation of the duty of the magistrate to decide for or against litigants without hearing the witnesses. Such a disregard of statutory obligation and natural justice would be as unjust and injurious as the misdescribing of a charge, or the hearing of a case *ex parte*. When the whole proceeding is *inverso ordine*, and the fundamental rules of the legal game are disregarded, the regularity in form of the decision cannot oust the jurisdiction of the Court. Such disregard of duty is a collateral matter affecting the conduct of the tribunal just as much as proved bias or interest, or it may be treated as a declining of jurisdiction. Arbitrators are usually supreme Judges of law and fact within the submission; but their refusal or omission to hear parties and witnesses would invalidate the award. It is inconceivable that a Superior Court Judge could try a case, civil or criminal, if contested, without witnesses or any form of proof.

IV. I do not think that the presence or absence of a *no-certiorari* clause can affect the question before us. The effect of such clauses was discussed by me in *Reg. v. Cork Justices* (5), and I may refer also to *Reg. v. Sheffield Railway* (6); *Reg. v. Wood* (7); *Reg. v. Badger* (8), which indicate that such clauses apply to irregularities of form or of procedure, not to matters of substance. The statute 12 & 13 Vict. c. 45, section 7, relative to amendment, has been so construed. In the case of Quarter Sessions, no-

(1) 10 B. & S., pp. 111, 117.

(5) [1898] 2 I. R. 694.

(2) 26 T. L. R. 419; S. C. [1910]

(6) 11 A. & E. 194.

2 K. B., p. 192.

(7) 5 E. & B. 49.

(3) [1892] 1 Q. B., pp. 375, 378.

(8) 6 E. & B. 137.

(4) 45 L. J. (M. C.) 95.

certiorari cannot apply to evidence or latent error of law, and such a clause does not protect against *certiorari* if the conviction is bad on its face. If the conviction incorporates depositions by reference, as *Heaphy's Case* (1) appears to decide, the conviction, if the depositions were insufficient, would be bad on its face, like that in *Rex v. Smith* (2). *Reg. v. Chantrell* (3) is (it is said) an authority against my view. It merely decides that the power of Sessions to state a case under the commission, as interpreted by ancient usage, is excluded by a no-certiorari clause, in the same way that such power was excluded by the word "final" in *Kydd's Case* (4). The case stated was collateral and not part of the record: *Walsall Case* (5). *Certiorari* was necessary as a formal matter to bring such case before the Court, and the jurisdiction of the Court was confined to the point of law on which its decision was asked. No-certiorari merely cut off a possible appeal. I fail to see how this type of case indicates that such a clause gives jurisdiction or screens its absence. The conviction or order being good on its face, was made defeasible by a case; and if the Court could not read the case, the order was impregnable. If the order was a speaking order incorporating the facts stated in the case, it would have been otherwise. *Certiorari* is upon the special case a formal step, and the Court does not go outside the specific questions raised: *Rex v. Thomas* (6); *Reg v. Hartpury* (7).

In *Heaphy's Case* (1), at p. 515, it is assumed that no-certiorari gives jurisdiction, so that the erroneous decision is conclusively presumed to be within jurisdiction and to exclude *habeas corpus*. It certainly confers no jurisdiction when the conviction is wrong on its face, or where, by incorporating evidence, it shows the error. I cannot find any case deciding that, if an apparently regular decision on the merits can be quashed as void for error, as being without jurisdiction, such void adjudication can be brought within jurisdiction by such a clause. No-certiorari could not possibly affect the parallel remedies of mandamus or prohibition. Nor can it protect where jurisdiction is abused. If, under the Crimes

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(1) 22 L. R. Ir. 500.

(2) 8 T. R. 588.

(3) L. R. 10 Q. B. 587.

(4) [1908] A. C., at p. 332.

(5) 4 App. Cas., 39, 40.

(6) 7 E. & B. 399.

(7) 8 Q. B. 566.

A. B. Div. 1910. *THE KING (MARTIN) v. MAHONY.* Gibson, J. Act, evidence was not taken in written form, could a conviction stand under the Act of 1882 any more than under the Act of 1887? See *Lawrenson v. Hill* (1). The *Bolton* doctrine of conclusiveness does not depend on, nor is its application affected by, the exclusion of *certiorari*. In most of the cases cited in the second section of my judgment there was no such clause; but it is found in three, where it was not made the basis of decision. Compare *R. v. St. Olaves* (2), where there was such a clause, with *Flannagan's Case* (3), where there was no such clause.

V. The Court of Quarter Sessions is admittedly not exposed to *certiorari* for insufficiency of evidence not apparent on its order. Why is this? It is said that the distinction between it and Petty Sessions is that it can decide the law. But though an appeal court, its jurisdiction is in quality the same as that of the court from which the appeal is taken.

The appeal is on law as well as fact. It is an inferior Court; its order must show jurisdiction, and the moment its order discloses error, as to inadequacy of evidence or otherwise, it is void in the same way as that of Justices: *Reg. v. Martin* (4); *R. v. Jukes* (5); *Lowther v. Radnor* (6); *Welch v. Nash* (7) (where the order held null had been confirmed by Sessions on appeal). So far as regards exercise of jurisdiction, original or appellate, the Quarter Sessions appear to possess all the infirmities of an inferior Court. Its determination can be quashed for failure of conditions precedent: *Reg. v. Surrey* (8); *Reg. v. Boulton* (9); *Reg. v. Authers* (10). If there is a *bonâ fide* question of title, its decision, if erroneous, does not bind: *Pease v. Chaytor* (11). If it declines jurisdiction on a preliminary point, mandamus goes just as against Justices, between whom and Quarter Sessions, as regards mandamus, there is no distinction, the decision of each on the merits, though erroneous, being conclusive: Shortt, p. 310. So far as relates to merits, the only difference between the Court of Quarter

(1) 10 Ir. C. L. R., at p. 185.

(2) 8 E. & B. 529.

(3) 8 E. & B. 451.

(4) 2 Q. B. 1037.

(5) 8 T. R. 536.

(6) 8 East, 113.

(7) 8 East, 394.

(8) L. R. 5 Q. B. 466.

(9) 4 A. & E. 498.

(10) 22 Q. B. D. 345.

(11) 3 B. & S., at p. 632.

Sessions and Petty Sessions appears to be that an order of the former, regular and right on its face, can only be reversed if it is able and chooses to state a case, whereas an adjudication of the latter can be reversed by appeal or case stated as of right. In case no such methods of reviewing the erroneous adjudication are adopted, the adjudication of each Court is, as to legal merits, equally final and conclusive. The *Roscommon Case* (1) is in point as to Quarter Sessions being essentially an inferior Court. Suppose that under the Crimes Act the evidence in writing did not support the conviction, and defendant having appealed did not appear, or did not call evidence, and the conviction was affirmed on the original written evidence only, if the original conviction was on its face void, as it would be if it incorporated the evidence as part of the record (if the defendant's view is right), would the affirmance of such void conviction be valid?

VI. (A) The cases of *Bailey* (2) and *Baker* (3), cited in Smith's Leading Cases, and accepted in *Sullivan's Case* (4) as deciding the general proposition that *certiorari* lies where there is want of evidence, are explained by the writer in Lord Halsbury's Laws of England, vol. x., p. 193, as depending on condition precedent. They were decided on 4 Geo. 4, c. 34, a statute considered in other cases, such as *Re Geswood* (5), which, with *Ex parte Baker* (6), is instructive. The statute assumes the relationship of master and servant as the basis of jurisdiction, in the same way that the Irish Land Act assumes the relation of landlord and tenant, which, if not existing in fact, deprived the Court of jurisdiction: *Hemphill v. Frazer* (7). The language of Lord Campbell in *Bailey's Case* (2) plainly points to condition precedent. His judgment in *Re Geswood* (5) on the same Act confirms this. As he more than once (as in *Flannagan's Case* (8), *Reg. v. St. Olave* (9), and *Reg. v. Badger* (10)) expressed his adherence to the doctrine of conclusiveness laid down in *Reg. v. Bolton* (11), he could not have intended to decide the direct

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(1) [1905] 2 I. R. 101, 112.

(2) 3 E. & B. 607.

(3) 2 H. & N. 219.

(4) 22 L. R. Ir. 98.

(5) 2 E. & B., at p. 954.

(6) 7 E & B. 697.

(7) 10 L. R. Ir. 87.

(8) 8 E. & B., at p. 455.

(9) 8 E. & B. 533.

(10) 6 E. & B., at pp. 167, 168.

(11) 1 Q. B. 66.

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(1) 3 E. & B. 607.

(2) 7 E. & B. 697.

(3) 6 H. & N., at p. 200.

(4) 1 Q. B. 66.

(5) 2 H. & N. 219.

(6) 7 B. & C. 536.

(7) 9 B. & C. 603.

(8) 9 B. & C. 628.

(9) 22 L. R. Ir. 500.

Re Authers (1) does not assist. The decision of Quarter Sessions there was without jurisdiction, and the defect was provable by affidavit; when proved, the invalid conviction could not be relied on as an answer to *habeas corpus*.

(B) *Hopwood's Case* (2) and *Blewitt's Case* (3), relied on by the Crown, do not form any part of the basis of my judgment. The latter case, the decision of a single Judge, Lush J. (one of the Court in *Vaughan's Case* (4)), merely follows the former. Both cases relate, not to insufficiency of evidence (which it had been conclusively settled could not be proved), but to omission to examine any witnesses, which, there having been several cases heard on the same occasion, was probably the result of misapprehension on the part of the Justices, who may have thought that one case was accepted as ruling the others. Whether this is so or not, I am of opinion, as already stated, that an adjudication without witnesses is in the teeth of the Petty Sessions Act and Dublin Code; is contrary to justice; and cannot be screened by a no-certiorari clause, which could not affect either mandamus or prohibition, in case of a defendant, as there would be no real hearing of his defence, as the cases cited in an earlier part of my judgment prove. *White v. Steele* (5) is an authority as to prohibition; *R. v. Morris* (6) as to certiorari and mandamus: *Reg. v. Marsham* (7) as to mandamus. The Crimes Act, 1887, requires the evidence to be taken in writing. If the Justices, disregarding this provision, convicted on oral evidence, could the conviction be supported? To convict without evidence at all, in defiance of all general summary jurisdiction statutes, seems a still more serious infraction of judicial conditions. To proceed to adjudication without hearing is essentially *ultra vires*, is declining of jurisdiction, and merits grave judicial censure. To miscarry occasionally in the ordinary exercise of jurisdiction is inevitable for any fallible though honest tribunal, but such error is *intra vires*, connotes no blame, and is only corrigible in the authorized manner.

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(1) 22 Q. B. D. 345.

(2) 15 Q. B. 121.

(3) 14 L. T. (N. S.) 598.

(4) L. R. 2 Q. B. 114.

(5) 12 C. B. (N. S.) 383.

(6) 26 T. L. R. 419; [1910]

2 K B. 192.

(7) [1892] 1 Q. B. 375.

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(c) As to Irish decisions, *MacNaghten's Case* (1) is an unsatisfactory case, and not founded on any legal principle. Burton, J., held that the evidence must be set out as part of the conviction, which is contrary to all the authorities in case of a general form of conviction. The other Judges thought that, though the evidence should not have been returned, still, as it was returned, they were at liberty to examine it and quash the conviction accordingly. The notion of *certiorari* by accident is untenable: *Reg. v. Abergele* (2): *Reg. v. Boulton* (3). The actual decision is adverse to the defendant here, as affidavits were held by the majority of the Court not to be admissible to make absolute the order.

As to the peace cases, the leading authorities, such as *Dunn's Case* (4) and *Rudyard's Case* (5), were decided on the apparent invalidity of the charge or warrant, and the *Derry Case* (6) could have been based on the same ground. But evidence is admissible to prove that there were no facts sworn to before Justices to support the order. That is because the jurisdiction is wholly exceptional. The hearing was essentially *ex parte*, the defendant could not call evidence, there was no appeal, and there could be probably no case stated. There is no decision on the merits at all. The peculiar character of this semi-ministerial jurisdiction is explained in *Stewart v. Gromett* (7), where it was held that, contrary to the general principle, an action for maliciously binding to peace lay without averring that the order had been discharged, though in a summary jurisdiction case, without appeal and therefore final, such an action was incompetent: *Basébé v. Mathews* (8). The reason was that in such latter case there was a *lis inter partes*, as there is now in England in peace cases under the Summary Jurisdiction Act of 1879. Hence the case stated in *Wise's Case* (9). The unique character of this precautionary jurisdiction is further illustrated by the fact that

(1) 9 Ir. L. R. 93.

(2) 8 A. & E. 394.

(3) 4 A. & E. 498.

(4) 12 A. & E. 599.

(5) 2 Vent. 22.

(6) 28 L. R. Ir. 440.

(7) 7 C. B. (N. S.) 191.

(8) L. R. 2 C. P. 684.

(9) [1902] 1 K. B. 167.

not merely may a defendant succeeding in a prosecution be bound over, but a successful complainant may be similarly bound: *R. v. Wilkins* (1). The language of Lefroy, C.J., in *O'Brennan's Case* (2) must be understood as confined to that peculiar species of jurisdiction; otherwise it would be inaccurate, and would be opposed to *Mac Naghten's Case* (3), as well as to settled law. The law of *certiorari* in England and Ireland is of course the same. The allowance of *certiorari* in this isolated type of case does not displace the *Bolton* rule, though it may show that such rule cannot be treated as an exhaustive definition. The formula in *Bunbury v. Fuller* (4) appears preferable. The judgments in *Lalor's Case* (5) (considered by me in *Daly's Case* (6)) and *Laurenson v. Hill* (7) all relate to matters of jurisdiction proper as distinct from merits. There must be, to found jurisdiction, a proper complaint, and the conditions of procedure prescribed must be followed.

As my conclusion is not affected by the presence or absence of a no-*certiorari* clause, I need not discuss whether *certiorari* is excluded in this case, as it possibly may be, under the Dublin Acts. Nor do I express any opinion as to the application of *habeas corpus* in reference to legislation of the special character found in the Crimes Act, 1882 (which excludes *certiorari*) and the Act of 1887 (which does not so exclude).

My judgment represents the following conclusions:—(1) As to merits: evidence and findings in a conviction, and findings of fact in an order, as part of the record under the old law, were never on *certiorari* traversable; (2) general forms were intended, *inter alia*, to exclude all questions as to evidence by removing it from the record; (3) a record, good on its face, was, as to the merits, conclusive; (4) Justices have jurisdiction to decide law relating to the matter of summary jurisdiction; (5) error, unless patent, can only be reached and corrected by appeal or case stated; (6) the Petty Sessions Act and Dublin Code do not incorporate the evidence with the adjudication, and the statutory forms of

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(1) [1907] 2 K. B. 380.

(2) 3 Ir. C. L. R. 589.

(3) 9 Ir. L. R. 93.

(4) 9 Ex. 140.

(5) 7 Ir. C. L. R. 438; 8 Ir. C. L. R. 115.

(6) [1898] 2 Ir. 694.

(7) 10 Ir. C. L. R.

K. B. Div. conviction and order thereby prescribed do not allow examination
 1910. of evidence. (7) No-*certiorari* clauses do not cure absence of
THE KING jurisdiction; (8) an unappealed decision of Justices on the merits,
 (*MARTIN*) apparently good and valid, is as final and conclusive as that of
v. Quarter Sessions. All of the above propositions seem opposed to
MAHONY. the reasoning in *Sullivan's Case* (1) and *Heaphy's Case* (2), but
Gibson, J. some, though important, are not essential to my decision.

The absence of any precedent in the books in support of defendant's contention seems as a negative argument nearly irresistible. The positive argument founded on *Bolton's Case* (3), and the uniform sequence of authorities since, confirms the negative argument, and would produce absolute certitude, were it not for the fact that the Lord Chief Baron does not accept my result as regards the Petty Sessions Act.

The question proposed for consideration in my judgment must be answered in the negative; *certiorari* is not applicable, because the evidence on which the record is founded cannot be examined. My brother Madden agrees with this judgment.

WRIGHT, J. :—

I have been afforded an opportunity of reading the judgment of my brother Gibson, and I entirely concur not only in the result at which he has arrived, but also in the reasoning by which that result is arrived at.

DODD, J. :—

I concur in the result. The principle I understand to be this—Where the Legislature prescribes a form of conviction, which does not require the evidence to be stated, whether the statute takes away, or does not take away, *certiorari*, and where there is nothing in the statutes which regulate the procedure, either by express provision or by necessary intendment, to make depositions, or a note of evidence, part of the record, this Court cannot on *certiorari* inquire whether the facts proved warranted the conviction.

(1) 22 L. R. 98.

(2) 22 L. R. Ir. 500.

(3) 1 Q. B. 66.

The facts here bring the case within this principle, and I am of opinion we cannot review the decision of the Divisional Magistrate.

We are asked to go further and say whether in our judgment the principle applies to Petty Sessions throughout Ireland. It appears so to apply in every case in which the person convicted does not require a note of evidence to be taken and signed by the magistrate. Does it apply in cases where the person convicted requires a note of the material evidence to be taken and signed? Is that note, when taken, by necessary intendment made part of the record? This point was not very fully argued or discussed, and I have some hesitation in trusting to my own examination of the statutes, but on the best opinion I can form, such note of evidence is not by necessary intendment made part of the record, so as to be examinable by this Court on *certiorari*.

The Summary Jurisdiction Act and Petty Sessions Act seem to me to be twin Acts, and, if construed together, it would be hard to hold that from the taking of a note there was a necessary intendment that it was to ground *certiorari* when the same code took away *certiorari*.

Solicitor for the prosecutor: *C. Friery*.

Solicitor for the complainant in the summons: *Malachy Kelly*.

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ARBITRATION—*Award—Setting aside—Misconduct of arbitrator.*] A submission to arbitration provided that the arbitrators should fix the value of a farm worked in partnership by the parties to the arbitration, and owned by them, and should also decide which of the said parties should have the first offer of purchasing the farm at that valuation. For the purpose of the arbitration each of the arbitrators was, with the assent of the parties, requested, "on behalf of the party whom he represented, to make a separate valuation of the farm." One of the arbitrators, accompanied only by the party who had nominated him, walked over and inspected the farm for the purpose of valuing it, and did not again inspect it. When the arbitration was held, the arbitrators, after comparing their valuations, and without calling any evidence or being requested to do so, made and published their award, by which they fixed the value of the farm. On a motion to set aside the award:—*Held*, that the award should be set aside, on the ground of misconduct on the part of one of the arbitrators in inspecting the farm in company with one party, and in the absence of the other or of any person representing him. *Walker v. Frobisher* (6 Ves. 70) followed. *In re Arbitration between Brien and Brien* - - - K.B. 84
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ARBITRATION—continued.

upon the motion; (4) that on the evidence the Court was at liberty to infer that compensation had been awarded beyond the jurisdiction of the arbitrators; (5) that the Court had jurisdiction to remit the award to be corrected by stating specifically the findings as to soundness and as to trade loss. *Walshaw v. Brighthouse Corporation* ([1899] 2 Q.B. 286) and *Brierley Hill Local Board v. Pearsall* (9 A.C. 595) discussed. *Quære* as to the jurisdiction of the arbitrators to determine the question upon which the liability of the sanitary authority depended, viz., the soundness or unsoundness of the carcase when it was seized? *In re Smith and Belfast Corporation* - K.B. 285

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See MARRIAGE.

CONTRACT—*Action of—Practice—Staying proceedings—Agreement to refer matters in dispute to English Court.*] A contract made between the Corporation of L., in Ireland, and C. & Co., Ltd., a Company having its registered office in England, and carrying on business there, contained a clause that the contract should "in all respects be construed and operate as an English contract, and in conformity with English law." The contract was made in Ireland, and the works to be done under it were to be executed there. An action for damages for breach of the contract having been instituted in the Irish Court by the Corporation of L. against C. & Co., on a motion by C. & Co., to stay all further proceedings in the action:—*Held*, affirming the decision of the King's Bench Division, that upon the true construction of the contract the parties thereto had agreed (while not purporting to oust for all purposes the jurisdiction of the Irish Courts) that the contract should be carried out in procedure under it, as if it had been made in England, and that therefore the King's Bench Division had rightly exercised its discretion in staying the action. *Mayor, &c., of Limerick v. Crompton* - - - - APP. 416

2.—*Right to sue on—Action by person not named as party to—Beneficial interest—Cestui que trust—No refusal by covenantee to sue.*] A person not named as a party to a covenant is nevertheless entitled to maintain an action upon it if he takes a beneficial right under it in the character of *cestui que trust*, the covenantee standing to him in the relation of trustee. In such a case the plaintiff is not bound, as a condition precedent to his right of action, to show that the covenantee has been asked, and has refused, to sue. Leasehold lands were conveyed by A. to B. for valuable consideration. By the deed of conveyance, to which A. and B. alone were parties, B. covenanted with A., and admitted that the conveyance was made on the express condition that B. would pay to C., during the life of the latter, one-half of the annual net profit rent of the lands. An action on this covenant brought by C. alone was dismissed on the ground that the plaintiff was not entitled to sue. On a new trial motion, *Held*, (1) that the plaintiff was in the position of *cestui que trust* under the covenant, entitled to claim payment out of a definitely ascertained fund, and was therefore entitled to maintain the action; and (2) that the plaintiff was not bound, as a condition precedent

CONTRACT—continued.

to his right of action, to prove that A. had been requested, and had refused, to bring an action on his behalf. *Gandy v. Gandy* (30 Ch. D. 57) followed. *Kelly v. Larkin and Carter* K. B. 550

CERTIORARI—Bias of Justices - 271, 658

See JUSTICES. 1, 2.

— Security for - - - 187, 190

See SECURITY FOR COSTS.

CLOTHING—Workers'—Accommodation for—Factory and Workshop Act, 1901, s. 79—Regulations, 26th Feb., 1906 - 591
See FACTORY. 2.

COUNTY BOROUGH—Revaluation - 534
See RATES.

COUNTY COUNCIL—Revenue—Income Tax—Interest allowed on County funds by bank as Treasurer—County Treasurers (Ireland) Act, 1867 (30 & 31 Vict. c. 46), s. 2—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sch. D.] A County Council is assessable to income tax upon interest allowed by a bank for moneys from time to time lying to the credit of the county with the bank as treasurer of the county. *Matthews, Appellant; Cork County Council, Respondent* - K.B. 521

— Highway—Injury to—Repair of damage—Right of action - - - 644
See HIGHWAY. 2.

— Highway—Surface water—Drain—Duty of adjoining owner to scour—Presumption of legal origin - - - 544
See HIGHWAY. 1.

COUNTY COURT—Remitting action to—One of several defendants resident out of the jurisdiction - - - 74
See REMITTING ACTION TO COUNTY COURT.

COURSE OF EMPLOYMENT—Negligence of fellow-servant - - - 381, 393
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— Reasonable action under specific order of overseer - - - 639
See WORKMAN. 3.

COVENANT—Mortgagee's right of action—Proceedings for sale pending 162, 165
See MORTGAGE.

— Right to sue on—*Cestui que trust*—Beneficial interest - - - 550
See CONTRACT. 2.

CRIMINAL LAW—Dentists Act, 1878—Unregistered person—“Specially qualified” - - - 220
See DENTIST.

— Irish penal code - - - 140
See MARRIAGE.

CRIMINAL LAW—continued.

— Justices—Bias—Certiorari - 271, 658
See JUSTICES. 1, 2.

— Sale of Food and Drugs Act—Inspector—Obstruction - - - 94
See WILFUL OBSTRUCTION.

CULVERT—Natural stream flowing through—Demise—Obligation to repair 334, 363
See WATERCOURSE.

DEATH—Adjudicating Justices—Case stated signed by survivor - 306, 323
See JUSTICES. 3.

— Applicant for compensation—Malicious injury—Survival of claim - 666
See MALICIOUS INJURY. 1.

— Caused by sudden chill—Workmen's Compensation Act - - - 105
See WORKMAN. 1.

— Drowning—Night watchman—Burden of proof—Workmen's Compensation Act
See WORKMAN. 5. [561]

DEBTOR'S SUMMONS—Bankruptcy—Amount of debt—Indorsement of summons—Notice—Particulars of demand—Affidavit—Trivial discrepancy—Form.] It is not necessary for the validity of a debtor's summons that the prescribed forms should be literally followed; it is sufficient if they have been in substance complied with, and that the debtor has not been misled and knew of the indebtedness alleged against him. *In re Shield* [APP. 399]

DEFAULT OF PLEADING—Judgment 194
See SPECIALLY INDORSED WRIT.

DENTIST—Unregistered person—Description implying specially qualified to practise dentistry—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.] The Dentists Act, 1878, provides that a person shall not be entitled to take or use any name, title, addition, or description implying that he is a person “specially qualified to practise dentistry,” unless he is registered under the Act. *Held*, that the words “specially qualified” refer to a qualification in the nature of a degree, diploma, &c., and do not include the case of a description implying mere personal skill or accomplishment. *Barnes v. Brown*, [1909] 1 K.B. 38, not followed. *Byrne, Appellant; Rogers, Respondent* [K.B. 220]

DEPENDANT—In part on wages of workman
See WORKMAN. 2. [324]

DISCOVERY—Libel—Particulars - 166, 171
See PARTICULARS.

DISCRETION OF COURT—Certiorari [421, 430]
See COMPULSORY PURCHASE.

DRAIN—Water flowing from highway—Duty to scour - - - 544
See HIGHWAY. 1.

DUTY—Legacy—Exemption - - 251
See CHARITY.

DWELLINGHOUSE—Exclusive occupation—Easement - - - 207
See PARLIAMENT. 1.

EASEMENT—Dwellinghouse—Franchise 207
See PARLIAMENT. 1.

EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

ELECTION—Petty Sessions Clerk 601, 617
See JUSTICES. 4.

EVIDENCE—Negligence—Scope of employment See NEW TRIAL. [42, 66, 69]

— Petty Sessions—Sufficiency to support conviction, whether examinable on *certiorari* See JUSTICES. 5. [695]

— User—Legal origin—Duty to scour drain 544
See HIGHWAY. 1.

— Workmen's Compensation Act, 1906—Burden of proof—Function of appellate Court See WORKMAN. 5. [561]

EXEMPTION—Legacy duty - - 251
See CHARITY.

FACTORY—*Dangerous parts of machinery—Fencing—Factory and Workshop Act, 1901, s. 10 (c) (d).*] The obligations imposed on owners of factories by clauses (c) and (d) of section 10 of the Factory and Workshop Act, 1901, are different in character. The obligation imposed by clause (c) is a continuing obligation, and applies to all times, even when the machine is under repair, examination, or exposure, as mentioned in clause (d), and is one requiring the owners of the factory to fence all dangerous parts of their machinery in such a manner as will be capable of ensuring the safety of the workers as far as is reasonably practicable, having regard to the exigencies of such repair, examination, or exposure; whereas the obligation under clause (d) applies to periods when the machinery is not under repair, examination, or exposure, and is an obligation to maintain the fencing in an efficient state, or, in other words, in such a state as will be capable of ensuring the safety of the workers. The owners of a factory are under a statutory obligation by virtue of section 10 of the Factory and Workshop Act, 1901, to securely fence all dangerous parts of their machinery in order to protect their workers, but are exempt from maintaining such fencing in an efficient state while the parts required to be fenced are under repair; and where, in breach of such statutory duty, they fail to provide any

FACTORY—*continued.*

fencing for such machinery, and a worker is injured through a dangerous part of such machinery not being fenced while undergoing repairs, they cannot escape liability on the ground that the *causa causans* of the plaintiff's injury was not the omission to provide the fencing, but to maintain it, and that consequently, although there may have been a breach of the obligation to provide the fencing, such breach was not the cause of the injury received by the worker from such machine while under repair. *Scott v. Brookfield Linen Co.* [K. B. 509]

2. — *Wet spinning—Humidity—Accommodation for workers' clothing—Regulations of 26th February, 1906—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79.*] Regulation 11 of the Regulations of the 26th February, 1906, made under section 79 of the Factory and Workshop Act, 1901, which requires that occupiers of factories in which wet spinning is carried on shall provide suitable and convenient accommodation "in which" to keep the clothing of the workers taken off before starting to work, does not impose an obligation on such occupiers to have a separate cloak-room outside the work-room. What is "suitable and convenient accommodation" is a question of fact in each particular case. In the case of buildings erected before 30th June, 1905, it does not necessarily follow as a matter of law that if such accommodation is provided in a work-room it must take the form of a press or wardrobe. *Eraut v. Ross*

[K. B. 591]

— Rules—Authority of overseer—Employee—Reasonable action under specific order See WORKMAN. 3. [639]

FELLOW-SERVANT—*Negligence of—Personal injury sustained in course of employment—Privilege given and enjoyed under contract of service.*] The employees in a large establishment belonging to the defendants, and consisting of numerous separate departments, were as part of the contract of service entitled to purchase goods in any department at a reduced price. The plaintiff, who was employed in the toy department on the third floor of the building, while purchasing meat at the butcher's department on the ground-floor, slipped on a piece of fat negligently (as found by the jury) left on the floor by the butcher, and sustained severe injuries. *Held*, that the injuries were caused in the course of the plaintiff's employment by the negligence of a fellow-servant, and that the plaintiff could not sustain an action for damages against her employers, the defendants. *Coldrick v. Partridge* ([1909] 1 K. B. 565; [1910] A. C. 77), applied. *Waldron v. Junior Army and Navy Stores*

[K. B. 381, App. 393]

FENCE—Dangerous machinery - - 509
 See **FACTORY**. 1.
 — Unconnected with canal or navigation 25
 See **MALICIOUS INJURY**. 2.
FIDELITY BOND—Renewal of appointment
 See **SURETY**. [277]
FIGURES—Amount of promissory note—Bills
 of Exchange Act, 1882, s. 83 - 688
 See **PROMISSORY NOTE**.
FOOD—Sale of Food and Drugs Acts—Obstruction
 of inspector - - - 94
 See **WILFUL OBSTRUCTION**.
 — Unsound—Condemnation and destruction of
 —Full compensation - - 285
 See **ARBITRATION**. 2.
FRANCHISE—Parliamentary.
 See **PARLIAMENT**.
FREEHOLDER—Unregistered transferee 17
 See **PARLIAMENT**. 2.
GAME-KEEPER—Injuries inflicted by poachers
 —Whether accident within Workmen's
 Compensation Act - - - 497
 See **WORKMAN**. 4.
GUARANTEE—Renewal of employment—Dis-
 charge of surety - - - 277
 See **SURETY**.
HEATHER — Burning of — Illegality without
 malice - - - 29
 See **MALICIOUS INJURY**. 3.
HIGHWAY—*Drain—Duty of adjoining occupier
 to scour—Water flowing from highway—Discharge on
 adjoining lands—Absence of a channel at outlet of drain
 —Prolonged user—Presumption of legal origin—6 &
 7 Wm. 4, c. 116, s. 162; 14 & 15 Vict. c. 92, s. 9.*
 The defendant was the occupier of lands adjoining
 a highway, and separated therefrom by a bank 3
 feet in width. A drain, or eye, which had been
 in existence for twenty-nine years, and by means
 of which surface-water from the highway was
 discharged on to the defendant's lands, passed
 through the bank. There was no evidence as to the
 origin of the drain, nor was there any defined
 channel on the defendant's lands into which the
 water so discharged could flow, nor any evidence
 that there had ever been such a channel. The
 defendant was prosecuted under 14 & 15 Vict.
 c. 92, s. 9, for neglecting to scour the drain in
 question when required to do so by the road
 authority. *Held*, that the Court ought to presume
 a legal origin for the drain, and that the defendant
 was therefore bound to scour it. *Attorney-General
 v. Copeland* ([1902] 1 K. B. 690) applied. *King's
 Co. County Council and O'Sullivan v. Kennedy* 544
 2. — *Locomotive—Traction-engine—Excessive
 weight—Injury to highway—Nuisance—Special
 damage—Road authority—Right of, to sue.* The

HIGHWAY—continued.

use of a traction-engine which, by reason of its
 excessive weight, does substantial and abnormal
 damage to a public road, adequate for ordinary
 traffic, is a public nuisance, even though the engine
 be constructed in compliance with the provisions
 of the Locomotive Acts, 1861 and 1865. In such
 a case the duty cast upon a county council to repair
 such damage, and the liability of a district council
 to provide the funds for such repair, amount to
 special damage, so as to make the owner of the
 traction-engine civilly liable at the suit of both
 bodies, suing jointly, for the cost of repairing the
 road:—*Semble*, such an action could be maintained
 by either body suing alone. *Cavan County Council
 and Bailieborough Rural District Council v. Kane*
 [K. B. 644]

HIRING—For special purpose - - 470
 See **MASTER AND SERVANT**.

HOLDING—Suitability of improvements—Town
 Tenants Act, 1906 - - - 76
 See **TOWN TENANT**.

HOUSE—Part of—Separate occupation - 207
 See **PARLIAMENT**. 1.

HUMIDITY — Factory — Accommodation for
 workers' clothing - - - 591
 See **FACTORY**. 2.

HUSBAND AND WIFE — Mixed marriage
 celebrated abroad by Roman Catholic
 priest—Validity of - - - 140
 See **MARRIAGE**.

IMPROVEMENTS — Sanction of Court to —
 Town Tenants Act, 1906, ss. 3 (3), 17
 See **TOWN TENANT**. [76]

INCOME TAX — Interest on county council
 funds - - - 521
 See **COUNTY COUNCIL**.

INSPECTOR—Sale of Food and Drugs Acts—
 Obstruction—Wilfulness - - 94
 See **WILFUL OBSTRUCTION**.

INTEREST—Allowed by treasurer of County
 Council—Income tax - - 521
 See **COUNTY COUNCIL**.

— On purchase-money—Land Law (Ireland) Act,
 1896, s. 40—Tenant accepting offer
 See **TENANT PURCHASER**. [626, 634]

IRISH CHURCH MISSIONS—Legacy to
 See **CHARITY**. [251]

JUDGMENT—By default—Specially indorsed
 writ—Tenant at will—Alleged surprise
 See **SPECIALLY INDORSED WRIT** [194]

— Interlocutory against one defendant—
 Second defendant resident out of the
 jurisdiction - - - 74
 See **REMITTING ACTION TO COUNTY
 COURT**.

JURISDICTION—Case stated in civil matter—Signed by survivor of adjudicating
Justices - - - 306, 323

See JUSTICES. 3.

— Contract to refer matters in dispute to
English Court - - - 416

See CONTRACT. 1.

— Justices—Insufficiency of evidence - 695

See JUSTICES. 5.

— Local Government Board—Rate of pension—

Appeal - - - 440, 447

See PENSION. 2.

— One of several defendants residing out of 74

See REMITTING ACTION TO COUNTY
COURT.

— To send back award - - - 285

See ARBITRATION. 2.

JUROR—Bias - - - 42, 66, 69

See NEW TRIAL.

JURY—Question for—Contributory negligence

See NEW TRIAL. [42, 66, 69]

— Withdrawing case from—Words not libellous
per se - - - 577

See LIBEL.

JUSTICES — Bias — Boycotting — Certiorari.]

Justices, in spite of objection, adjudicated on a charge of assault brought by the claimant to an evicted farm against the purchaser of it and two of his servants, the former of whom had been boycotted immediately after a meeting of the local branch of the United Irish League had been held, which meeting had been attended by the Justices in their capacity as members of the League. The defendants were convicted. There was evidence that the boycott was a result of the meeting in question. *Held*, that under the circumstances of the case, there was a real likelihood of bias on the part of the Justices, and that they were disqualified from adjudicating on the charge in question. *The King (Kingston) v. Justices of Co. Cork* K.B. 658

2. — Bias — Personal ill-will towards defendants

— Securities for good behaviour—Certiorari—Costs]

Summonses were issued on the complaint of the District Inspector, Royal Irish Constabulary, against three persons named *D.*, members of the same family, as defendants, charging them with obstructing the police, and calling on them to show cause why they should not enter into recognizances to be of good behaviour. The summonses were heard before two Justices. The defendants objected to one of the Justices, *B.*, adjudicating, on the ground that a bad feeling existed between him and them. *B.* insisted on adjudicating; and orders were made requiring the defendants to enter into recognizances to be of good behaviour. A conditional order for a writ of *certiorari* to quash the orders of the Justices was obtained by the defendants, grounded on affidavits made by them

JUSTICES—continued.

alleging that bad feeling had for years existed between the *D.* family and *B.*, and that on the day after the orders had been made by the Justices, *B.* was overheard to say that he would not leave any member of the *D.* family in the district. Cause against making the conditional order absolute was shown on behalf of the Crown, but no cause was shown by *B.* individually, and he did not deny the allegations in the defendants' affidavit. *Held*, that the conditional order for a writ of *certiorari* should be made absolute. *Held*, also, that *B.* should pay the costs of the defendants in the *certiorari* proceedings. *The King (Donoghue) v. Justices of Co. Cork* - - - K.B. 271

3. — Case stated—Summonses heard by several

Justices—Death of some of Justices before signing

case—Case signed by surviving Justice alone—

Jurisdiction of Court to hear—20 & 21 Vict. c. 43,

s. 2—Caretaker—Summonses for delivery of possession

—Writ of possession issued, but physical possession

not taken—Caretaker's agreement signed—Estoppel

—Landlord and Tenant (Ireland) Act, 1860 (23 & 24

Vict. c. 154), s. 86—Jurisdiction—Appeal—

(20 & 21 Vict. c. 43), s. 6.] A summons was heard

at Petty Sessions before three Justices, *A.*, *B.*, and*C.*, who unanimously dismissed it, but unani-

mously agreed to state a case under 20 & 21 Vict.

c. 43. A case, the draft of which had been

approved of on behalf of both the parties, was

approved of and signed by *A.* It was approved of by*B.*, who, however, died without having signed it.*C.* died without having either approved of orsigned it. *Held* (by Lord O'Brien, L.C.J., andMadden, J.; Wright, J., *diss.*), that therewas jurisdiction to hear the case. *R.* held certain

premises under a lease for three lives, subject to a

mortgage to *K.* In the year 1902, *K.* recovered

judgment for possession, and a writ of possession

was issued. Actual physical possession was not

taken under the writ, but *R.* signed a caretaker's

agreement acknowledging that he was in possession

solely as caretaker for *K.* *R.* continued to pay

the rent and outgoings, but paid nothing either

for principal or interest on foot of the mortgage.

K. died, and the appellant, his personal represen-tative, demanded possession from *R.*, and on

possession being refused, applied to the Justices at

Petty Sessions, upon a summons issued against *R.*,

for an order for delivery of possession of the

premises. *Held*, by Lord O'Brien, L.C.J., and

Madden, J., that the appellant was entitled to

such order. The respondent having appealed from

this order to the Court of Appeal: *Held*, following*Harvey v. Copeland* (32 L. R. Ir. 419), that no

appeal lay, and the Court of Appeal ordered the

case to be struck out, but without costs. *Kean,**Appellant; Robinson, Respondent*

[K. B. 306, App. 323]

JUSTICES—continued.

4.—*Clerk of Petty Sessions—Election of—Justices of district—Office held during pleasure—Office de facto full—Mandamus—21 & 22 Vict. c. 100, s. 7.*] At an election held for the appointment of a clerk for certain Petty Sessions districts, an office held during pleasure, out of thirteen Justices present seven voted for *W.* and six for *R.* Thereupon *W.* was declared elected. His election was approved by the Lord Lieutenant, and he entered on the duties of the office. One of the Justices who voted for *W.* was not a Justice of any of the Petty Sessions districts in question within the meaning of 21 & 22 Vict. c. 100, s. 7. *R.* having applied for a writ of mandamus requiring the Justices of the districts to elect a clerk of Petty Sessions: *Held*, by the Court of Appeal, affirming the decision of the King's Bench Division, that the writ should issue. *Reg. (M'Devitt) v. Strabane Urban District Council* (35 I. L. T. R. 12) applied and followed. *The King (Rogeroft) v. Justices of Schull, &c., Petty Sessions Districts and Whitley* - - - K. B. 601, Apr. 617

5.—*Jurisdiction—Conviction—Insufficiency of evidence—Certiorari—Power of Superior Court to examine evidence.*] *M.* was convicted by a Dublin Divisional Magistrate of an offence under sections 1 and 3 of the Betting House Act, 1853, on evidence which, if examinable, was insufficient to support the conviction. The prosecution was under the Dublin Summary Procedure Acts, 1 Vict. c. 25, and 5 Vict. c. 24, which prescribe a general form of conviction, not stating or incorporating the evidence. *M.* having applied to quash the conviction on *certiorari* on the ground of insufficiency of evidence: *Held*, by the Court, that the conviction, being regular and following the statutory form, could not be quashed on such ground, as the evidence could not be examined. *Held*, also, by Lord O'Brien, L.C.J., and Gibson, Madden, Boyd, Kenny, Wright, and Dodd, JJ. (Palles, C.B., dissenting), that the same principles applied to prosecutions under the Petty Sessions (Ireland) Act, 1851, and that neither the column in the statutory order book directing witnesses' names to be stated, nor sect. 20, sub-s. 4, of that statute, which requires, on request, a note of the material part of the evidence given to be taken and signed by the Justice, incorporated the evidence, or enabled the Court to examine it on *certiorari*. *Held*, by Lord O'Brien, L.C.J., and Gibson, Madden, Boyd, Kenny, and Wright, JJ., that the mere absence of evidence to warrant a conviction did not oust jurisdiction, but amounted merely to error as distinguished from want of jurisdiction. The reasoning on this point in *The Queen v. Sullivan* (22 I. R. Ir. 504, note) preferred to that in *In re Sullivan* (*Ibid.* 98), and in *In re Heaphy* (*Ibid.* 500).

JUSTICES—continued.

Brittain v. Kinnaird (1 Br. & B. 432), and *The Queen v. Bolton* (1 Q. B. 66), discussed and applied. *In re Bailey* (3 E. & B. 607), and *In re Baker* (2 H. & N. 219) distinguished. *Held*, by Palles, C.B., that the note in writing of the evidence signed by a Justice under section 20, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, is examinable by the King's Bench Division on *certiorari*, and if it does not disclose sufficient evidence of guilt, a conviction founded on it is liable to be quashed. *In re Sullivan* and *In re Heaphy* explained. *Per* Dodd, J.—Where the Legislature does not require the evidence to be stated, whether the statute takes away, or does not take away, *certiorari*; and where there is nothing in the statutes which regulate the procedure, either by express provision or by necessary intendment, to make the depositions or a note of the evidence part of the record, the King's Bench Division cannot, on *certiorari*, inquire whether the facts proved warranted the conviction. The effect of clauses excluding *certiorari* discussed. *The King (Martin) v. Mahony* - - - K. B. 695

6.—*Public Health—Nuisance—Order of Justices for abatement—Necessity of signature by majority of Justices concurring in order—Order not signed till several days after pronounced—Certiorari—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), ss. 112, 261, 279; Sch. C., Form C.*] Summonses were issued under s. 111 of the Public Health (Ireland) Act, 1878, requiring the defendants therein to abate certain alleged nuisances. The summonses were heard before five Justices, and three of them being of opinion that a nuisance existed in each case, orders were made for abatement. Formal orders, following Form C in Schedule C to the Act, were drawn up, and were signed, several days after the decision, by two of the Justices, one of these being one of the dissenting Justices, and served on the defendants. After a conditional order had been obtained to quash the orders, they were signed by the other two Justices who formed the majority of the Court. Section 261 of the Public Health (Ireland) Act, 1878, takes away *certiorari* in the case of orders relating to the execution of the Act. *Held*, (1) that the orders should have been signed by the majority of the adjudicating Justices; (2) that the omission of the signatures did not go to jurisdiction, and that such omission should be corrected by the Justices signing afterwards; (3) that the delay in signing and completing the orders did not warrant *certiorari*. *The King (Donnell) v. Justices of Londonderry*. [K. B. 458]

7.—*Warrants in rate cases—Execution of—Addressing to constabulary or other person—Duty and discretion of Justices—Petty Sessions (Ireland)*

JUSTICES—continued.

Act, 1851 (14 & 15 *Vict. c.* 93), *s.* 25 (2).]
 Section 25, sub-section 2, of the Petty Sessions (Ireland) Act, 1851, which provides that Petty Sessions warrants in cases other than offence cases "shall be addressed either to the District Inspector or Head Constable of constabulary . . . or to such other person or persons (not being the complainant or a party interested) as the Justices issuing same shall see fit," imposes no obligation on a complainant to nominate to the Justices some suitable person other than the constabulary, to whom the warrant should be addressed and issued for execution. The sub-section imposes a statutory obligation on the magistrates to address such warrants either to the constabulary, or, in their discretion, to some other person (not being the complainant or a party interested), and if they refuse to perform such duty, a mandamus will issue to compel them. The complainant may nominate to the Justices a suitable person as the person to whom the warrant ought to be addressed, but the Justices may, in their discretion, refuse or reject any such person so nominated. *The King (Moore) v. Justices of Co. Dublin* - K. B. 681

— Permissive occupant—Order for possession—*23 & 24 Vict. c.* 154, *s.* 86 - 38
See PERMISSIVE OCCUPANT.

— Plans, &c., deposited with Provisional Order—Labourers Acts—Correction of errors - - - 421, 430
See COMPULSORY PURCHASE.

— Sale of Food and Drugs Acts—Inspector—Obstruction—*Mens rea* - - - 94
See WILFUL OBSTRUCTION.

LAND JUDGE—Petition for sale—Mortgagee's right of action on covenant 162, 165
See MORTGAGE.

LAND LAW (IRELAND) ACTS—*Intervening interest*—Sale to sub-tenant—Liability for arrears of rent—*Irish Land Act*, 1903 (3 *Edw. 7, c.* 37), *ss.* 15, 16, 25—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 14.] Where the owner of an estate agrees to sell, under the Land Purchase Acts, a parcel of land to a sub-tenant in exclusive occupation thereof, and orders are made by the Irish Land Commission vesting the land in the sub-tenant, ordering payment into the Bank of Ireland of the purchase-money, and directing claims to attach to it, and declaring that the sub-tenant shall be deemed a tenant, and the parcel of land a holding, the sub-tenant is discharged from liability in respect of arrears of rent due to his immediate landlord. *McFarlane v. Booth*

[K. B. 12]

— 1881, *s.* 15—Sub-tenant acquiring middleman's estate - - - 112, 124
See SUB-TENANT.

LAND LAW (IRELAND) ACTS—continued.

— 1896, *s.* 40—Tenant purchaser—Liability to rent or interest - - - 626, 634
See TENANT PURCHASER.

LANDLORD AND TENANT—Action to recover possession—Caretaker—Summary order for possession - 38, 306, 323
See JUSTICES. 3.

PERMISSIVE OCCUPANT.

— Action to recover possession—Tenant-at-will—Special indorsement - - - 194
See SPECIALLY INDORSED WRIT.

— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

— Lease.

See LEASE.

— Sub-tenant—Acquisition of middleman's estate - - - 112, 124
See SUB-TENANT.

— Tenant purchaser—Liability to rent or interest - - - 626, 634
See TENANT PURCHASER.

— Town Tenants Act—Improvements 76
See TOWN TENANT.

LEASE—*Renewable during lessor's lifetime, and term of years "to commence from death of last life in said indenture of lease."*] By indenture of lease made in 1781, *S. M.* demised the lands of *C.* to *C. C. (I)*, his heirs, executors, administrators, and assigns, for the lives of three persons named therein, and for the term of thirty-one years, from the death of the survivor of the said three lives; and, by a bond of even date therewith, *S. M.* bound himself in the penal sum of £500 that he would, during his life, at the request of *C. C. (I)*, his heirs or assigns, add or insert such lives or life as the said *C. C. (I)*, his executors, administrators, or assigns, should nominate in the room of the lives named in the lease, in case they, or any of them, should die in the life of the said *S. M.*, so as to keep up three lives in the said lease during the life of the said *S. M.* By indenture, made in 1802, between the said *S. M.* and *C. C. (II)*, the successor in title of *C. C. (I)*, after reciting the said bond, and reciting the death of two of the lives named in the lease of 1781, it was witnessed that the said *S. M.*, in consideration of the said bond, and in part performance of the conditions therein, granted the said lands to *C. C. (II)*, his heirs, executors, administrators, and assigns, for the lives and life of the survivor of the lives named in the lease of 1781, and of two other persons, and the life of the survivor, and for the full term of thirty-one years, "to commence at the death of the last life in said indenture of lease." *C. C. (III)*, one of the lives added by the lease of 1802, survived the other lives named therein. In an action of

LEASE—continued.

ejection, brought by the successor in title of *S. M.*:—*Held*, by the King's Bench Division and by the Court of Appeal, that the term of thirty-one years commenced to run on the death of *C. C.* (III), and not on the death of the survivor of the lives named in the lease of 1781. *Madden v. Maguire*

[K. B. 112, App. 124]

— Permanent buildings contemplated by —
Sanction of Court to improvements 76
See TOWN TENANT.

— Reservations and exceptions—Natural stream flowing in part through culvert—Obligation on lessor to repair—Purpose of demise - - - 334, 363
See WATERCOURSE.

LEGACY—Clear gift not cut down by subsequent ambiguous words - - 465
See ABSOLUTE GIFT.

— To Irish Church Missions - - 251
See CHARITY.

LIBEL—Words not libellous per se—*Withdrawal of case from jury—Publication—Letter addressed to plaintiff, and opened by his clerk—Privilege.*] The plaintiff, who had for a number of years practised dentistry though not registered as a dentist, applied to the defendants to be admitted as a dental student at their hospital. The defendants' committee passed a resolution in the following words: "Resolved—That Mr. Keogh cannot be accepted as a student at this hospital, the committee having the right by their by-laws to refuse any student without assigning a cause." A copy of this resolution was sent to the plaintiff in a letter addressed to him. It was opened, and the copy of the resolution read, by the plaintiff's assistant, whose practice was to open plaintiff's letters in his absence. The plaintiff brought an action for libel. No extrinsic evidence was given to show that the words had a libellous tendency. There was no evidence that the defendants knew of the practice as to the plaintiff's assistant opening his letters. *Held*, that the words were not *per se* libellous, and that a verdict was rightly directed for the defendants. *Capital and Counties Bank v. Henty* (7 A. C. 741); *McCann v. Edinburgh Ropery Co.* (23 L. R. Ir. 24, 35); and *O'Hea v. Guardians of Cork Union* (32 L. R. Ir. 629) applied. *Held*, also, by Lord O'Brien, L.C.J., and Dodd, J., that there was no evidence of a publication for which the defendants could be made responsible. *Per* Dodd, J.: The communication, if published, and if defamatory, was privileged. *Keogh v. Incorporated Dental Hospital of Ireland*

[K. B. 577]

— Particulars - - - 166, 171
See PARTICULARS.

LICENSE—Publican's—Extent of—Bar in yard of licensed premises - - 175
See LICENSING ACTS.

LICENSING ACTS—Licence for house—Sale of spirits at bar in yard—*Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 3.] *A.* was the owner of a house with a yard and offices at the rear, the whole being enclosed by walls, and he held a licence authorizing him to sell spirits, &c., in the house, for consumption on or off the premises. He opened a bar at the end of the yard, having an entrance from the street at the rear of the premises, and sold spirits there:—*Held*, that the licence authorized a sale in the house alone, and that *A.* was guilty of the offence of selling spirits at a place where he was not authorized by his licence to sell the same. *Murnane, Appellant; Adams, Respondent.*

[K. B. 175]

— Public-house — General shop — Structural separation - - - 200
See PUBLIC-HOUSE.

LOCAL GOVERNMENT—Auditor—*Certiorari*—Security for costs - - 187, 190
See SECURITY FOR COSTS.

— Central Pension Authority—Appeal—Jurisdiction - - - 440, 447
See PENSION. 2.

— Highway - - - 544, 644
See HIGHWAY. 1, 2.

— Union charges—Apportionment—Revaluation - - - 534
See RATES.

LOCAL PENSION COMMITTEE—Decision—Age—*Certiorari* - - - 403
See PENSION. 1.

— Decision—Appeal - - - 440, 447
See PENSION. 2.

LOCAL REGISTRATION OF TITLE ACT—Unregistered transferee—£5 freehold franchise - - - 17
See PARLIAMENT. 2.

LOCOMOTIVES ACTS—Traction engine 644
See HIGHWAY. 2.

LODGER—Claim—Services in lieu of rent 1
See PARLIAMENT. 3.

MACHINERY—Dangerous—Fencing 509
See FACTORY. 1.

MALICIOUS INJURY—Compensation—Death of applicant—Executors of applicant—Survival of right—6 & 7 Wm. 4, c. 116, s. 135; 61 & 62 Vict. c. 37, s. 5.] When an application is made under 6 & 7 Wm. 4, c. 116, s. 135, as amended by the Local Government (Ireland) Act, 1898, s. 5, for compensation for malicious injury to property, and the applicant dies pending the determination of the case in Court, his personal representative is entitled

MALICIOUS INJURY—continued.

to continue the proceedings, and to recover such compensation for the injury to the property of the deceased applicant as the latter would have been entitled to had he survived. *Glynn and Kennedy, Applicants; Clare County Council, Respondents* [APP. 666]

2. — *Fence—Damage to—Compensation—6 & 7 Wm. 4, c. 116, s. 135—61 & 62 Vict. c. 37, s. 5.* An ordinary wire fence adjoining a road, but not connected with any canal or navigation, was maliciously destroyed, to the extent of £3:—*Held*, that the fence was not included in the words “other work” in the 135th section of 6 & 7 Wm. 4, c. 116, and was not the subject of compensation under that Act, as extended by the Local Government (Ireland) Act, 1893. *Bell and Lucas, Applicants; Co. Council of King’s Co., Respondents* APP. 25

3. — *Heather—Burning of—Malice—10 Wm. 3, c. 8, s. 7—24 & 25 Vict. c. 97, s. 16—61 & 62 Vict. c. 37, s. 5.* *K.*, the owner and occupier of lands adjoining those of the applicant, set fire to the heather on his own lands at a date prohibited by statute. The fire spread to and injured the lands of the applicant, which was the natural and probable consequence of the act of *K.*, who, however, had no intention of injuring the lands of the applicant:—*Held*, that as the act of *K.*, though illegal, was, on the evidence, not malicious, and was not accordingly a crime punishable on indictment under the Malicious Damage Act, 1861, the applicant was not entitled to compensation under section 5 of the Local Government (Ireland) Act, 1893, in respect of the injury done to his lands. *Woodley, Applicant; Cork Co. Council, Respondents* [APP. 29]

MANDAMUS—Election of petty sessions clerk—
Alleged plenary - - - 601, 617
See JUSTICES. 4.

MARRIAGE—Construction of statute—19 Geo. 2, c. 13 (Ir.), s. 1—Irish Penal Code—Statute rendering void any marriage of a Protestant celebrated by a Roman Catholic priest, whether extra-territorial in operation. Section 1 of 19 Geo. 2, c. 13 (Ir.), enacting that every marriage after the year 1746 celebrated between a Papist and any Protestant, or between two Protestants if celebrated by a Popish priest, should be null and void, was not extra-territorial in its operation, and did not, while it was in force, affect a marriage celebrated in a foreign country. In 1833, while this enactment was in force and unrepealed, a marriage was celebrated in Austria between *A.*, a Protestant and domiciled Irishman, and *B.*, who was a Roman Catholic, by a Roman Catholic priest *in facie ecclesiæ*. This marriage was valid according to Austrian law, and at that time there was no other way in which a

MARRIAGE—continued.

marriage could be validly contracted in Austria:—*Held*, that this marriage was not avoided by sect. 1 of 19 Geo. 2, c. 13 (Ir.), and therefore that *A.* could not, while *B.* was alive, contract a valid marriage with another woman. *Swifts v. Attorney-General* - - - - - APP. 140

MASTER AND SERVANT—Hiring for particular service—Master whether parting with control of servant to hirer—Negligence causing injury to hirer’s servant—Common employment. The Belfast Harbour Commissioners have under their statutory powers the control of the harbour and of all piers, docks, and quays, belonging to it; and it is their duty to assign a berth to a vessel to be discharged in the port; they have power to provide cranes for the unloading of such vessels, and it is their duty to provide proper servants and labourers for working such cranes for the use of the public (2). The master of a vessel hired a crane from the commissioners for the purpose of her discharge. He signed a request for its use, subject to the Commissioners’ regulations, containing an agreement that he was to be responsible for all loss or damage arising from any improper use of the crane while so employed. The crane was put into position by the craneman, and the vessel was moved to a berth opposite it. The practice is, that the buckets are filled by the hirer’s servants, in the hold, one of whom directs the craneman to raise and lower each bucket, and to swing round the arm of the jib. The craneman regulates by a brake the speed of ascent and descent of each bucket, and he alone works the machine. While the plaintiff, being employed for that purpose by the shipmaster, was filling a bucket in the hold, an empty bucket, while being lowered by the crane, descended with great speed and violence, and struck plaintiff, who was seriously injured. The craneman was employed and paid by the Commissioners, who alone could dismiss him. Except in directing buckets to be raised or lowered, neither the hirer nor his servants had any control over the craneman. If the shipmaster was dissatisfied, his only remedy would be to direct the craneman to stop working, and to apply to the Commissioners to send another in his place, which they might or might not do. In no event could the hirer employ a servant of his own to work the crane, or procure a crane workable on the pier from anyone but the Commissioners. In an action by the plaintiff against the Commissioners to recover damages for personal injuries, the jury found that the hirer had no authority to control the craneman otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets; that the bucket which injured the plaintiff got out of the control of the craneman through his negligence; and that

MASTER AND SERVANT—*continued.*

this negligence was the cause of the accident :—
Held, reversing the judgment of the King's Bench Division; who followed M'Fadden v. Belfast Harbour Commissioners (unreported, K. B. D., 11th May, 1903), that the plaintiff was entitled to a verdict, that the agreement of the hirer to be responsible for any improper use of the crane afforded no defence to the plaintiff's action, and that the plaintiff and craneman were not at the time of the accident fellow-servants engaged in a common employment. *Donovan v. Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629 distinguished. *M'Cartan v. Belfast Harbour Commissioners* - - - App. 470 [Aff.]

— Factory—Dangerous machinery—Fencing
 See FACTORY. 1. [509]

— Letter opened by clerk — Libel—Publication - - - - - 577
 See LIBEL.

— Manager of public-house—Responsibility of proprietor - - - - - 94
 See WILFUL OBSTRUCTION.

— Negligence of fellow-servant—Injuries sustained in course of employment 381, 393
 See FELLOW-SERVANT. |

— Scope of employment—Evidence 42, 66, 69
 See NEW TRIAL.

— Surety—Resignation and re-appointment of principal - - - - - 277
 See SURETY.

— Wet spinning—Accommodation for workers' clothing - - - - - 591
 See FACTORY. 2.

— Workmen's Compensation Act.
 See WORKMAN.

MENS REA—Wilful obstruction - - - 94
 See WILFUL OBSTRUCTION.

MISCONDUCT — Arbitrator — Setting aside award - - - - - 84
 See ARBITRATION. 1.

— Intentional—*Mens rea*—62 & 63 Vict. c. 51, s. 16 - - - - - 94
 See WILFUL OBSTRUCTION.

MISTAKE—As to plot taken—Labourers Acts—Justices - - - - - 421, 430
 See COMPULSORY PURCHASE.

MORTGAGE—Mortgagee's right to sue on personal covenant—Petition for sale by another mortgagee pending—*Landed Estates Court Act*, 1858 (21 & 22 Vict. c. 72), s. 69.] A mortgagee's right of action against his mortgagor upon the personal covenant of the latter for payment of the mortgage debt is not suspended while a petition for the sale of the mortgaged lands brought by another mortgagee is pending in the Land Judge's Court. *Sinton v. Dooley* - K. B. 162, App. 165

NEGLIGENCE—Contributory—Scope of employment - - - - - 42, 66, 69
 See NEW TRIAL.

— Employer—Factory and Workshops Act, 1901, s. 10 (c), (d) - - - 509
 See FACTORY. 1.

— Fellow-servant—Injuries sustained in course of employment - - - 381, 393
 See FELLOW-SERVANT.

— Master and servant—Master parting with control of servant while engaged on special service - - - 470
 See MASTER AND SERVANT.

NEGOTIABLE INSTRUMENT—Promissory note—Amount—Figures - - - 688
 See PROMISSORY NOTE.

NEW TRIAL—Unsatisfactory trial—Master and servant—Scope of employment—Accident—Contributory negligence—Amendment of pleadings—Jury finding against the uncontradicted evidence of a single witness upon issue going to root of case—Bias of juror—Entering verdict and judgment for party against whom jury found.] The plaintiff's husband was killed by a motor-car, the property of the defendant, and driven at the time by *W.*, who was defendant's chauffeur. There was much contradictory evidence as to the negligence of *W.* and the contributory negligence of the deceased; but upon this the verdict, if given by an unbiassed jury, could not admittedly be disturbed. The main defence, though not specifically raised by pleading, was that *W.* was not, at the time of the fatal occurrence, acting within the scope of his employment as the defendant's chauffeur. On this question he was the only witness produced, the defendant himself being in Egypt for health's sake. *W.*'s evidence was to the effect that on the day in question, while driving the defendant from Leopards-town races to a restaurant in Dublin, they met a broken-down car, and took its occupants to Dublin. At the restaurant the defendant directed *W.* to take these persons to their home at Ratoath, and then to drive to defendant's place at Castleknock. On leaving Ratoath, instead of going to Castleknock, as ordered, *W.* drove in the car to visit his wife at Ringsend, where he stopped for five minutes, and returned to Castleknock, in the course of which return the accident happened. There was nothing on cross-examination, or otherwise, to throw doubt on *W.*'s veracity, and there was no evidence to contradict him. The Judge at the trial refused to allow the pleadings to be amended so as to specially raise the question whether *W.* was acting within the scope of his duty when the accident occurred; but he left that question to the jury, who found in the affirmative. The Judge reported that one of the jurors appeared to have formed an opinion in the course of the

NEW TRIAL—*continued.*

trial very favourable to the plaintiff. The jury found for the plaintiff on all the questions submitted to them. The King's Bench Division having set aside the verdict, and directed a new trial, on the ground that the trial was unsatisfactory; and the Court of Appeal having directed a verdict and judgment to be entered for the defendant: the House of Lords reversed the decision of the Court of Appeal, and restored that of the King's Bench Division, directing a new trial. *O'Reilly v. M'Call* - - K. B. 42, App. 66, H. L. 69

NUISANCE—Order for abatement—Signature
See JUSTICES. 6. [458]

OBSTRUCTION—Inspector under Sale of Food and Drugs Act—Wilfulness - 94
See WILFUL OBSTRUCTION.

OCCUPATION—Exclusive—41 & 42 Vict. c. 26, s. 5—Franchise - - - 207
See PARLIAMENT. 1.

OCCUPIER—Permissive—Justices—Order for possession - - - 38, 306, 323
See JUSTICES. 3.

PERMISSIVE OCCUPANT.

— Rated—Supplemental list - - 21
See PARLIAMENT. 4.

OFFICE—Held during pleasure—Plenary—Mandamus - - - 601, 617
See JUSTICES. 4.

OLD AGE PENSION.

See PENSION.

ORDER—Justices—Permissive occupancy—23 & 24 Vict. c. 154, s. 86 - - 38
See PERMISSIVE OCCUPANT.

ORDERS, GENERAL—1899 (Parliamentary Registration) Sched. Part I., Rule 3.
See PARLIAMENT. 4. [21]

— 1905 (22nd Feb.), III., R. 6 (F) 194
See SPECIALLY INDORSED WRIT.

— XIX., R. 7- - 166, 171
See PARTICULARS.

— App. V., No. 4. - - 399
See DEBTOR'S SUMMONS.

OVERSEER—Authority of—Reasonable action of employee pursuant to specific order
See WORKMAN. 3. [639]

PARLIAMENT—*Dwelling-house*—*Inhabitant householder*—*Easement enjoyed by another party*—41 & 42 Vict. c. 26, s. 5—“*Sole and exclusive use*”—*Part of a house separately occupied.*] Where the franchise is claimed under 41 & 42 Vict. c. 26, s. 5, in respect of part of a house alleged to be separately occupied as a dwelling, there must be sole and exclusive use by the occupier of that statutory dwelling-house; and such sole and exclusive use is negated

PARLIAMENT—*continued.*

by the existence of an easement, such as a right of passage enjoyed as of right by another party, over any part of the premises which constitute the statutory dwelling-house. *M'Bride v. Bryans*, [1908] 2 I. R. 329, re-considered by the full Court of Appeal and, after re-argument, adhered to and followed. *Steele v. Mahon* - - App. 207

2. — *£5 freeholder*—*Representation of the People (Ireland) Act*, 1850 (13 & 14 Vict. c. 69), s. 2—*Title—Local Registration of Title (Ireland) Act*, 1891—*Registered land—Unregistered transferee.*] The transferee of land registered under the Local Registration of Title (Ireland) Act, 1891, is not entitled to the freehold franchise until the transfer is registered. *M'Gettigan v. Roulstone*

[App. 17]

3. — *Lodger franchise*—*Column of claim for “amount of rent paid” filled in “services in lieu of rent.”*] A claimant for the lodger franchise, in stating the particulars of his alleged qualification, inserted in the column headed “Amount of rent paid” the words “Services in lieu of rent.” No evidence was given on behalf of either the claimant or the objector:—*Held*, by the Court of Appeal (Palles, C.B., and Holmes, L.J.; Lord O'Brien, L.C.J., dissenting), that the words “services in lieu of rent” disclosed only the relationship of master and servant, and not that of landlord and tenant, and that the claimant was not entitled to the franchise. *Topping v. Keogh* - App. 1

4. — *Rating—Claim to be rated—Representation of the People (Ireland) Act*, 1850, sections 15, 20, 23, 110—*Registration (Ireland) Rules*, 1899, *Schedule, Part I, Rule 3—Supplemental List.*] Where a person otherwise entitled to the franchise as rated occupier has been omitted from the rate, and claims to be rated between the publication of the Rate Book and that of the Supplemental List of Rated Occupiers, and has paid all rates due in respect of the qualifying premises, he is properly placed on the Supplemental List. *Coyne v. M'Farland* - - App. 21

PARTICULARS—*Libel—Practice—Judicature Act*, 1877, s. 61—*R. S. C., I. (Feb. 22, 1905), Order XIX., Rule 7.*] In an action of libel the defendant is not entitled to particulars of the name or names of the person or persons to whom, the date or dates on which, and the place or places where, the alleged libel was published, in the absence of special grounds requiring them, and especially in a case where the particulars of publication (if any) must be known to the defendant. *Semle*: There is no established practice in England for ordering such particulars in actions for libel without special grounds, which would, under section 61 of the Judicature Act, 1877, coerce the Courts in this country to depart from their

PARTICULARS—continued.

hitherto well-settled practice. *Keogh v. Dental Hospital* - - - K. B. 166, APP. 171

— Of demand—Debtor's summons - 399
See DEBTOR'S SUMMONS.

PENSION—Old Age Pensions Act, 1908 (8 *Edw. 7, c. 40*), ss. 2, 7—*Condition that person must have attained the age of seventy years—Pension allowed by Local Pension Committee—Conclusiveness of decision—Certiorari.* It is a condition precedent to the jurisdiction of a local pension committee to allow a pension under the Old Age Pensions Act, 1908, that the claimant should have attained the age of seventy years, and if the claimant has not, in fact, attained that age, the decision to allow the pension, although not appealed from within the prescribed time, is not final and conclusive. If, after the allowance of the pension, it is shown that the claimant had not attained the age of seventy years, the local pension committee may, on a question raised by the pension officer, disallow the pension. *Quære*: if the decision of a local pension committee allowing or disallowing a pension is the subject of *certiorari*. *The King (Sinnott) v. Local Pension Committee Co. Wexford* [K. B. 403

2. — *Rate of pension—Question as to rate—Appeal to central authority—Jurisdiction—Old Age Pensions Act, 1908* (8 *Edw. 7, c. 40*), ss. 7, 9.] *P.* was awarded an old age pension by a local committee at the rate of 2s. a week, and no appeal was taken from this award to the central pension authority. *P.* subsequently wrote to the local pension committee a letter purporting to raise a "question" as to the rate of his pension, and claiming 5s. a week in lieu of 2s., but not alleging any change in his circumstances, no such change, having, in fact, occurred. The local pension committee having refused to increase the amount of *P.*'s pension, the latter appealed to the central pension authority, who, on the alleged grounds that *P.*'s means were such as not to entitle him to any pension, decided accordingly that he was not so entitled. The King's Bench Division (Palles, C.B., and Johnson, J.) were unable to agree as to whether *P.* was entitled to a writ of *certiorari* to quash this decision:—*Held*, by the Court of Appeal, affirming the view taken by Palles, C.B., that the original decision of the local pension committee, not having been referred to the central pension authority, was final and conclusive, under section 7 (2) of the Old Age Pensions Act, 1908, and that accordingly the order of the central pension authority depriving *P.* of his pension was made without jurisdiction, and should be quashed. *The King (Pawley) v. Local Government Board* - - - K. B. 440; APP. 447

PERMISSIVE OCCUPANT—Justices—Order

—*Summons—Landlord and Tenant (Ireland) Act, 1860* (23 & 24 *Vict. c. 154*), s. 86.] In proceeding under section 86 of the Landlord and Tenant (Ireland) Act, 1860, to recover possession from a permissive occupier, it is unnecessary, either in the complaint or in the order of the Justices, to distinguish the precise character of the occupation, viz., whether the occupier is in occupation as servant, or herdsman, or caretaker, or otherwise permissively, specifying the precise character of the occupation. Where the complaint stated that the occupation was as "hired servant or caretaker," and the Justices simply gave an order for possession: *Held*, reversing the decision of the King's Bench Division, that the order was valid *ex facie*. *The King (Mahony) v. The Justices of Co. Cork* - - - APP. 38

— Caretaker—Summary order for possession
See JUSTICES. 3. [306, 323]

PETTY SESSIONS CLERK—Election—

Mandamus - - - 601, 617
See JUSTICES. 4.

PLEADING—Amendment - - 42, 66, 69
See NEW TRIAL.

PLENARTY—Office—Petty Sessions Clerk—

Void election—Mandamus - 601, 617
See JUSTICES. 4.

POACHERS—Injuries inflicted on gamekeeper

—Whether accidental within Workmen's Compensation Act, 1906 - - 497
See WORKMAN. 4.

POOR RATE—Warrant of Justices—Execution

—Constabulary - - - 681
See JUSTICES. 7.

PRACTICE—Appeal—Case stated by Justices in

civil matter—Decision of Divisional Court - - - 306, 323
See JUSTICES. 3.

— Bankruptcy — Debtor's summons —

Form - - - 399
See DEBTOR'S SUMMONS.

— *Certiorari*—Costs—Bias - 271, 658
See JUSTICES. 1, 2.

— *Certiorari* — Decision of Local Pension Committee - - - 403
See PENSION. 1.

— *Certiorari*—Discretion of Court 421, 430
See COMPULSORY PURCHASE.

— *Certiorari* — Order of Justices — Evidence whether examinable by Superior Court
See JUSTICES. 5. [695]

— *Certiorari*—Order of Justices—Signatures—Delay in completing - - 458
See JUSTICES. 6.

PRACTICE—continued.

- Mandamus — Office held during pleasure
— Penalty - - - 601, 617
See JUSTICES. 4.
- New trial—Unsatisfactory nature of former
trial - - - 42, 66, 69
See NEW TRIAL.
- Particulars—Libel - - 166, 171
See PARTICULARS.
- Question for jury — Contributory negli-
gence - - - 42, 66, 69
See NEW TRIAL.
- Remitting action to County Court — Co-
defendants — Judgment against one —
Second resident out of jurisdiction 74
See REMITTING ACTION TO COUNTY
COURT.
- Security for costs—*Certiorari* 187, 190
See SECURITY FOR COSTS.
- Sending back award to arbitrators 285
See ARBITRATION. 2.
- Setting aside award - - 84
See ARBITRATION. 1.
- Specially indorsed writ—Action to recover
possession — Tenancy-at-will - 194
See SPECIALLY INDORSED WRIT.
- Staying proceedings — Contract to refer
matters in dispute to English Court
See CONTRACT. 1. [416]
- Withdrawal of case from jury — Words
not libellous *per se* - 577
See LIBEL.

PRESUMPTION—Legal origin - 544
See HIGHWAY. 1.

PRINCIPAL AND SURETY.
See SURETY.

PRIVILEGE — Enjoyed under contract of
service - - - 381, 393
See FELLOW-SERVANT.

— Libel - - - 577
See LIBEL.

PROMISSORY NOTE—*Negotiable instrument*
— *Validity of—Sum stated in figures in margin, but*
not stated in body of note—Bills of Exchange Act,
1892, s. 83.] A promissory note, bearing an
embossed 6d. stamp, with the figures £50 in the
margin, but no sum stated in the body of the note,
held to be, as between the original parties to it, a
valid and complete note for £50, there being
evidence to show that they had so regarded it, and
a finding by the Judge at the trial without a jury,
that it was given in payment of a debt of £50.
Heency v. Addy - - - K. B. 688

PUBLICATION—Libel - - - 577
See LIBEL.

PUBLIC-HOUSE—Licensing Acts—"Structural
separation"—*Movable net-work—Sale of Intoxi-*
cating Liquors (Ireland) Act, 1906, s. 2 (6 Edw. 7,
c. 39).] A wire net-work which is constructed on
a wooden frame fastened with bolts to the walls,
and is of such a character that liquor could be
passed through it by an expedient, is not a
"structural separation" within the meaning of
6 Edw. 7, c. 39. A movable structure which is
dependent for its attachment and detachment on
the volition of the publican and his servants, and
which might be left unattached through their
negligence, is not a "structural separation." *Per*
GIBSON, J.—What the statute contemplates is
something structurally annexed to the premises,
operating as a permanent or quasi-permanent
separation. *Toppin v. Coleman* - K. B. 200

— Extent of licence—Bar in yard - 175
See LICENSING ACTS.

— Manager—Responsibility of proprietor 94
See WILFUL OBSTRUCTION.

RATES—Union comprising county borough and
portions of counties—*Revaluation of county borough*
— *Apportionment of Union charges—Local Govern-*
ment (Ireland) Act, 1898, sections 43, 65, sub-
section 2.] In a Union which comprised a county
borough and portions of two adjacent counties, the
county borough was revalued under section 65,
sub-section 1, of the Local Government (Ireland)
Act, 1898, showing a substantial increase of valua-
tion. *Held*, affirming the judgment of the King's
Bench Division, that the apportionment under
sub-section 2 of that section was to be made in
proportion to the rateable value of each part of the
Union on the valuation of the county borough in
force immediately before the revaluation, and on
the valuation of the respective county portions in
force at that date. *Belfast Poor Law Guardians v.*
Corporation of Belfast and County Councils of
Antrim and Down - - - APP. 534

— Claim to be rated—Supplemental list 21
See PARLIAMENT. 4.

— Poor rate—Warrant—Execution - 681
See JUSTICES. 7.

REFEREE—Difference between Tramway Com-
pany and Road Authority - 236
See TRAMWAY.

RELIGION—Propagation of - - 251
See CHARITY.

**REMITTING ACTION TO COUNTY
COURT**—*One defendant resident in Ireland and*
one in England—Interlocutory judgment marked
against defendant resident in Ireland—Common
Law Procedure (Ireland) Act, 1870 (33 & 34 Vict.
c. 109), s. 6.] An action of trespass was brought
against two defendants, A. and B. A. resided in

REMITTING ACTION TO COUNTY COURT—continued.

Dublin and *B.* in Liverpool. *A.* was first served with the writ of summons, and, no appearance having been entered by him, interlocutory judgment was marked against him. *B.* having been afterwards served with the writ, applied to have the action remitted for trial before the Recorder of Dublin. *Held*, that there was no jurisdiction to remit. *Shannon v. Oglesby and O'Callaghan*

[K. B. 74]

RENEWAL—Employment—Fidelity bond—
Conditions - - - - 277
See SURETY.

— Lease - - - - 112, 124
See LEASE.

RENT—Arrears of—Sale to sub-tenant—Land Law Acts - - - - 12
See LAND LAW (IRELAND) ACTS.

— Liability of tenant-purchaser—Land Law (Ireland) Act, 1896, s. 40—Action for sum less than either rent or interest
See TENANT-PURCHASER. [626, 634]

REPAIR—Culvert—Lease—Reservation 334,
See WATERCOURSE. [363]

— Highway—Sudden damage—Traction engine - - - - 644
See HIGHWAY. 2.

RESERVATION—Lease—Watercourse 334
See WATERCOURSE. [363]

REVENUE—Income tax—Interest allowed by treasurer of County Council - 521
See COUNTY COUNCIL.

— Legacy duty—Exemption—Charitable bequest - - - - 251
See CHARITY.

RIGHT OF ACTION—Covenant—Party beneficially interested in - - - 560
See CONTRACT. 2.

— Injury to highway—County and Rural District Councils - - - - 644
See HIGHWAY. 2.

ROAD AUTHORITY—Consent of—Construction of tramway authorized by statute
See TRAMWAY. [236]

— Highway—Injury to—Traction engine 644
See HIGHWAY. 2.

— Highway—Surface-water—Drain - 544
See HIGHWAY. 1.

RURAL DISTRICT COUNCIL—Injury to highway—Repair of damage—Right of action - - - - 644
See HIGHWAY. 2.

— Labourers' cottages—Mistake as to plot
See COMPULSORY PURCHASE. [421, 430]

SALE—To sub-tenant—Land Law Acts—Arrears of rent - - - - 12
See LAND LAW (IRELAND) ACTS.

SCOPE OF EMPLOYMENT—Evidence

See NEW TRIAL. [42, 66, 69]

SECURITY FOR COSTS—*Local Government Board Audit*—*Certiorari*—*Local Government Act (Ireland)*, 1871, s. 12—*Practice.*] Where a conditional order has been granted for a writ of *certiorari* to remove into the Court of King's Bench any allowance, disallowance, or surcharge made by an auditor of the Local Government Board in an audit under ss. 11 to 18 of the Local Government Act (Ir.) 1871, the Court has jurisdiction to stay the issue of the conditional order until the prosecutor shall have entered into and perfected an effective recognizance, with or without securities, as the exigency of the case, having regard to the means of the prosecutor, may require, conditioned in the terms prescribed by s. 12 of the said Act. *The King (Currid) v. Baker* - K. B. 187, App. 190

SEGREGATION—Items of compensation—Public Health Act, 1878, s. 274 - 285
See ARBITRATION. 2.

SERVANT

See MASTER AND SERVANT.

SHOP—Separation from public-house - 200
See PUBLIC-HOUSE.

SPECIALLY INDORSED WRIT—*Action for the recovery of land—Pleading—Practice—Tenancy at will—Vacating judgment—Surprise—R. S. C. I. (February 22, 1906), Order III., Rule 6 (F.).*] A claim for possession of lands held under a tenancy at will can be specially indorsed under Order III., Rule 6. In an action for the recovery of lands by a landlord against a tenant occupying the lands under a tenancy at will, in respect of which a notice to quit had been served, the writ was specially indorsed with a claim for possession. The defendant made an offer of settlement, and stated that the offer was to remain open for a week. Before this period had elapsed, the plaintiff, without making any reply to the offer, signed final judgment in default of pleading. On a motion to vacate the judgment on the grounds (a) of surprise and (b) that the claim did not come within the scope of Order III., Rule 6: *Held*, by the King's Bench Division that there had been no surprise: *Held*, by Boyd and Wright, JJ., *dissentiente* Andrews, J.), that the claim could be specially indorsed under Order III., Rule 6, and that the judgment should only be set aside upon terms: *Kenp and another v. Lester*, ([1896] 2 Q.B. 162) applied. *Pitkington v. Power* - K. B. 194

STATUTES—10 Wm. 3, c. 8 (Ir.) Game, s. 7 29
See MALICIOUS INJURY. 3.

STATUTES—continued.

- 19 Geo. 2, c. 13 (Ir.) Marriages, s. 1 - 140
See MARRIAGE.
- 6 & 7 Wm. 4, c. 116—Grand Juries, s. 135 25,
See MALICIOUS INJURY. 1, 2. [656
 ———, s. 162 - - - - 544
See HIGHWAY. 1.
- 5 & 6 Vict. c. 82—Legacy duty - - 251
See CHARITY.
- 8 Vict. c. 20—Railways, s. 7 - - 421, 430
See COMPULSORY PURCHASE.
- 13 & 14 Vict. c. 69—Representation of the People,
 s. 2 - - - - 17
See PARLIAMENT. 2.
 ———, ss. 15, 20, 23, 110 - - 21
See PARLIAMENT. 4.
- 14 & 15 Vict. c. 92—Summary Jurisdiction, s. 9
See HIGHWAY. 1. [544
- 14 & 15 Vict. c. 93—Petty Sessions, s. 25 (2) 681
See JUSTICES. 7.
- 16 & 17 Vict. c. 34—Income Tax, s. 2, schedule D
See COUNTY COUNCIL. [521
- 20 & 21 Vict. 43—Justices of the Peace, ss. 2, 6
See JUSTICES. 3. [38, 306, 323
PERMISSIVE OCCUPANT.
- 21 & 22 Vict. c. 72—Landed Estates Court 162,
See MORTGAGE. [165
- 23 & 24 Vict. c. 154—Landlord and Tenant, s. 86
See JUSTICES. 3. [306, 323
- 24 & 25 Vict. c. 97—Malicious Injuries, s. 16 29
See MALICIOUS INJURY. 3.
- 30 & 31 Vict. c. 46—County Treasurer, s. 2 521
See COUNTY COUNCIL.
- 33 & 34 Vict. c. 78—Tramways, s. 33 - 236
See TRAMWAY.
- 33 & 34 Vict. c. 109—Common Law Procedure
 s. 6 - - - - 74
*See REMITTING ACTION TO COUNTY
 COURT.*
- 34 & 35 Vict. c. 109—Local Government, s. 12 187
See SECURITY FOR COSTS. [190
- 35 & 36 Vict. c. 94—Licensing, s. 3 - 175
See LICENSING ACTS.
- 38 & 39 Vict. c. ccix. — North Dublin Street
 Tramways, s. 16 - - - 236
See TRAMWAY.
- 40 & 41 Vict. c. 57—Judicature, s. 61 166, 171
See PARTICULARS.
- 41 & 42 Vict. c. 26—Parliamentary and Municipal
 Elections, s. 5 - - - 207
See PARLIAMENT. 1.
- 41 & 42 Vict. c. 33—Dentists, s. 3 - - 220
See DENTIST.
- 41 & 42 Vict. c. 52—Public Health, s. 274 285
See ARBITRATION. 2.
 ———, ss. 112, 261, 279; Schedule C,
 Form C - - - - 458
See JUSTICES. 6.

STATUTES—continued.

- 44 & 45 Vict. c. 49—Land Law, s. 15 112, 124
See SUB-TENANT.
- 45 & 46 Vict. c. 61—Bills of Exchange, s. 83 688
See PROMISSORY NOTE.
- 48 & 49 Vict. c. 77—Labourers, s. 19 (4) 421, 430
See COMPULSORY PURCHASE.
- 50 & 51 Vict. c. 33—Land Law, s. 14 - 12
See LAND LAW (IRELAND) ACTS.
- 54 & 55 Vict. c. 66—Local Registration of Title,
 s. 25 (1) - - - - 17
See PARLIAMENT. 2.
- 59 & 60 Vict. c. 47—Land Law, s. 40 626, 634
See TENANT PURCHASER.
- 61 & 62 Vict. c. 37—Local Government, s. 5 25,
See MALICIOUS INJURY. 1, 3. [29, 666
 ———, ss. 43, 65, sub-s. 2 - - 534
See RATES.
- 62 & 63 Vict. c. 51—Sale of food and drugs, s. 16
See WILFUL OBSTRUCTION. [94
- 1 Edw. 7, c. 22—Factories and Workshops, s. 10
 (c) (d) - - - - 509
See FACTORY. 1.
 ———, s. 79 - - - - 591
See FACTORY. 2.
- 3 Edw. 7, c. 37—Land Law, ss. 15, 16, 25 12
See LAND LAW (IRELAND) ACTS.
- 6 Edw. 7, c. 39—Intoxicating Liquors, s. 2 200
See PUBLIC-HOUSE.
- 6 Edw. 7, c. 54—Town Tenants, ss. 3 (3), 17 76
See TOWN TENANT.
- 6 Edw. 7, c. 58—Workmen's Compensation 105
See WORKMAN. 1.
 ———, s. 1, sub-s. 1 - 497, 561, 639
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 ———, First Schedule, s. 1 (a) (i., ii.) 324
See WORKMAN. 2.
- 8 Edw. 7, c. 40—Old Age Pensions, ss. 2, 7 403
See PENSION. 1.
 ———, ss. 7, 9 - - - - 440, 447
See PENSION. 2.

STAYING PROCEEDINGS—Contract to refer
 matters in dispute to English Court 416
See CONTRACT. 1.

STRUCTURAL SEPARATION — Public-
 house—Shop - - - - 200
See PUBLIC-HOUSE.

SUB-TENANT—Landlord and tenant—Judicial
 sub-tenant acquiring middleman's interest—Land
 Law (Ireland) Act, 1881, sect. 15 — Action to
 recover possession of land.] A judicial sub-tenant,
 who acquires the estate of his immediate landlord,
 is not entitled, by section 15 of the Land Law
 (Ireland) Act, 1881, on the determination of that
 estate, to continue in possession of the land com-
 prised in the sub-tenancy as tenant from year to year
 to the next superior landlord. In an action of eject-
 ment, brought on the determination of a lease, the

SUB-TENANT—*continued.*

defendant, who had purchased the lessee's interest some years previously, proved that, at the date of the purchase, he was in occupation of part of the premises demised by the lease as judicial sub-tenant of the then lessee, and that the assignment to him was made subject to his tenancy in part of said lands. Judgment having been given for the plaintiff in the action for possession, on a motion by the defendant to vary the judgment:—*Held*, by the King's Bench Division and by the Court of Appeal (*dissentiente* Cherry, L.J.), that the defendant was not entitled, under section 15 of the Land Law (Ireland) Act, 1881, to retain possession, as tenant from year to year to the plaintiff, of that part of the lands of which he had been in possession as sub-tenant at the date of the purchase of the lessee's interest in the lease. *Madden v. Maguire*

[K. B. 112, App. 124

— Sale to—Land Law Acts—Arrears of rent

See LAND LAW (IRELAND) ACTS. [12

SUDDEN CHILL—Death supervening on 105

See WORKMAN. 1.

SUPPLEMENTAL LIST — Claim to be rated - - - 21

See PARLIAMENT. 4.

SURETY—*Fidelity bond—Condition—Resignation and re-appointment of principal—Appointment whether renewable—Discharge of surety.* On the appointment, in 1901, of *B.* by the plaintiff Society as their store-clerk, *B.* and the defendants entered into a bond with the plaintiff Society for his fidelity "during such time as he continues to hold the same, in virtue of his present appointment or of any renewal thereof, if such office is of a renewable character." Pursuant to a resolution passed by the plaintiff Society, that any employee seeking an increase of salary should give one month's notice of resignation, *B.*, who sought an increase of salary, gave a month's notice of resignation, and was re-appointed, his salary being increased. *Held*, that the employment was not renewable in its character within the meaning of the bond, and that the sureties were not liable for defalcations after the re-appointment. *Toames Co-operative Society v. Foley* - APP. 277

SURPRISE—Offer to compromise—Judgment by default - - - 194

See SPECIALLY INDORSED WRIT.

SURVIVAL OF RIGHT—Malicious injury—Claim for compensation—Death of applicant - - - 666

See MALICIOUS INJURY. 1.

TENANCY-AT-WILL — Specially indorsed writ - - - 194

See SPECIALLY INDORSED WRIT.

TENANT-PURCHASER—*Land Law (Ireland) Act, 1896, s. 40—Tenant accepting offer—Prolonged interval prior to completion—Liability of tenant-purchaser when sued for sum less than either rent or interest on purchase-money.* Where a tenant in 1902 accepted the offer for sale of his holding made by the Land Judge under section 40 of the Land Law (Ireland) Act, 1896, and, from causes for which the tenant was not responsible, the sale was not completed in 1909, although good title was shown by the landlord:—*Held*, by the Court of Appeal, affirming the order of the King's Bench Division, that the tenant was liable to pay a sum for which he was sued by civil bill, pursuant to leave in that behalf of the Land Judge, less than either the rent or interest on the purchase-money, irrespective of section 35 of the Land Law (Ireland) Act of 1896, which by agreement of counsel, on which the Court acted, was assumed not to be applicable to the case. *Donaldson & Browne v. Meredith* - - - K.B. 626, App. 634

TOWN TENANT—6 *Edw. 7, c. 54—ss. 3 (3), 17—Sanction of proposed improvements—Holding—Permanent buildings contemplated by lease—Extension of premises to meet increase and development of business.* By lease, dated the 2nd July, 1897, a plot of ground in the village of *D.*, containing 4A. 1R. 30P., was demised to the applicants, who were laundrymen, for a term of 150 years, from the 25th March, 1896. The lease was made in consideration partly of the lessees' having erected new laundry buildings, to the satisfaction of the lessor, on the demised premises at an expense of £6000. The lease contained a clause prohibiting the erection on the demised premises, without the consent of the lessor, of "any wooden sheds, wood-roofed buildings, or any other buildings or erections whatsoever, except summer-houses and greenhouses, and except further buildings, or alterations to existing buildings which may be required for the use of the laundry business now carried on upon the demised premises." The laundry buildings occupied about two acres, leaving two acres unbuilt upon at the date of the lease. On these the applicants proposed to erect an extension of the laundry at a cost of £1500, which extension was necessary to provide accommodation for the increasing business of the laundry. In the opinion of the Court of Appeal this extension was suitable to the character of the holding, and would not depreciate the letting value of the adjoining property of the landlord:—*Held*, that the demised premises constituted a "holding" within the 17th section of the Town Tenants (Ireland) Act, 1906, and, reversing the decision of the Recorder of Dublin, that the proposed additional buildings should be allowed, notwithstanding that the landlord objected. *Edmondson, Applicants; Earl of Pembroke and Montgomery, Respondent.*

[App. 76

TRACTION ENGINE — Excessive weight —
Injury to highway - - - 644
See **HIGHWAY**. 2.

TRAMWAY — Construction of line authorized by statute — Consent of road authority — Refusal of — Grounds which will justify — Demand of way-leave rental — “Difference between Tramway Co. and road authority” — Settlement by referee appointed by Board of Trade—North Dublin Street Tramways Act, 1875 (38 & 39 Vict. c. ccix), s. 16—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33.] Section 16 of the North Dublin Street Tramways Act (1875) (which is similar in terms to section 33 of the Tramways Act, 1870) contains the following enactment:—“If any difference arises between the company on the one hand and the [road authority] on the other hand, with respect to any interference or control exercised or claimed to be exercised by them, or on their behalf, or by the Company by virtue of this Act, in relation to any of the Company’s tramways or works, or in relation to any work or proceeding of the [road authority] or with respect to the propriety of, or the mode of execution of, any work relating to any tramway, or with respect to the amount of compensation to be made by or to the Company, or on the question whether any work is such as ought reasonably to satisfy the [road authority], or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party.” This enactment is still in force as regards the rights, powers, and privileges of the Dublin United Tramways Company (1896), Limited, under the North Dublin Street Tramways Acts of 1875 and 1876, and the Dublin United Tramways (Electrical Power) Act, 1897, and applies to a dispute as to the terms upon which the consent of the Corporation of Dublin, as the “road authority,” should be given to the construction of a tramway authorized by the said Acts. Such consent must be given or refused upon reasonable grounds; and the road authority has not an absolute right to withhold its consent for the purpose of exacting a way-leave rental arbitrarily fixed by itself. *R. v. Croydon and Norwood Tramway Co.* (18 Q.B.D. 39) applied. *Quere*, whether, in the absence of a special agreement recognized by statute, the road authority has power to demand any way-leave rental for the use of a tram-line authorized by statute. *The King (Corporation of Dublin) v. FitzGibbon* - K.B. 236

TRIAL—Unsatisfactory - - - 42, 66, 69
See **NEW TRIAL**.

TRUSTEE—Covenant—Right of *cestui que trust* to sue - - - 550
See **CONTRACT**. 2.

UNCERTAINTY—Award—Sending back 285
See **ARBITRATION**. 2.

UNION CHARGES—Apportionment—Revaluation - - - 534
See **RATES**.

UNSOUND FOOD—Condemnation and destruction—Award of compensation — Ambiguity - - - 285
See **ARBITRATION**. 2.

USER—Presumption of legal origin - 544
See **HIGHWAY**. 1.

WARRANT—Order of Justices — Execution — Constabulary - - - 681
See **JUSTICES**. 7.

WATCHMAN — On board ship — Accidental drowning—Burden of proof—Workmen’s Compensation Act, 1906 - - - 561
See **WORKMAN**. 5.

WATER—Flowing from highway—Adjoining drain—Duty to scour - - - 544
See **HIGHWAY**. 1.

WATERCOURSE— Lease — Construction—Reservations and exceptions — Purpose of demise — Natural stream conveyed partly through culvert—Ownership of culvert—Obligation on lessor as owner of culvert to keep same in repair, notwithstanding absence of any covenant by him to do so—Damages for injury by flooding.] A lease for twenty-one years of demesne lands to be used as a dairy or pasture holding, and expressed to be made for the lessor’s temporary convenience pending the development of the land for building purposes, excepted and reserved to the lessor, for his exclusive use and benefit, *inter alia*, “rivers and rivulets, lakes, pools, water, and water-courses, and roads, with all necessary power and dominion over the same, with power to the lessor to divert, embank, and apply the said rivers, . . . water, and water-courses, as the lessor should see convenient or expedient to direct and appoint, and also excepting and reserving unto the lessor all and every such reasonable roads and ways to . . . springs, wells, and places of watering cattle, as have formerly been used, or shall hereafter be found necessary or useful to the lessor.” Four natural streams converged at a point near the middle of the demised lands, and were conveyed thence by an artificial channel or culvert. There was no covenant in the lease imposing the obligation to keep this culvert in repair upon either lessor or lessee, but there were covenants by the lessee at the end or sooner

WATERCOURSE—*continued.*

determination of the term to deliver up the premises, and, *inter alia*, “all water-courses” in good repair and condition. There was a clause in the lease empowering the lessor on demand to take up possession of the whole or any part of the demised lands for the purpose of building. *Held*, in the King’s Bench Division, by Boyd and Kenny, JJ., *diss.* Dodd, J., that on the true construction of the lease the flowing water merely, and not the culvert, was reserved to the lessor. *Held*, by Dodd, J., and by the Court of Appeal, that the culvert was reserved to, and was the property of, the lessor, who was therefore as regards the lessee, who occupied the position of an adjoining owner, bound to maintain the culvert in such a state of repair as would prevent damage to the lessee by flooding. The culvert having collapsed on three occasions from obstruction and want of repair, and the lands having been in consequence flooded and seriously damaged, a special jury who viewed the lands awarded the lessee £300 damages. In the absence of any ground for supposing that the amount awarded was unreasonably out of proportion to the damage actually caused, the Court of Appeal, affirming the view taken by Dodd, J., refused to disturb the verdict on the ground that the damages were excessive merely by reason of the clause for resumption of possession by the lessor on demand. *Anderson v. Cleland* - K.B. 334, App. 363

WAY.

See HIGHWAY.

WAY-LEAVE—Road authority—Construction of line authorized by statute - 236
See TRAMWAY.

WILFUL OBSTRUCTION—*Sale of Food and Drugs Act, 1899, s. 16*—“Wilfully”—*Mens rea*—*Manager of public-house*—*Responsibility of proprietor*—*Obstruction of inspector.*] Section 16 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), enacts that any person who wilfully obstructs or impedes any inspector . . . in the course of his duties under the Sale of Food and Drugs Acts, or, by any gratuity, bribe, promise, or other inducement, prevents or attempts to prevent the due execution by such inspector . . . of his duty under those Acts,” shall be liable on summary conviction to the fines therein mentioned:—*Held*, that the offence created by the section is one of intentional misconduct, involving personal *mens rea*. Where an inspector of food and drugs required a sample of whiskey from a particular bottle, and the husband of the publican, who the Justices found was at the time acting as her manager, while pretending to uncork it, deliberately, as the Justices found, broke the bottle; but the Justices did not find that he did so at the request or with the authority or connivance of his

WILFUL OBSTRUCTION—*continued.*

wife, nor was there any evidence to that effect:—*Held*, that a conviction against the wife for wilful obstruction of the inspector could not be sustained. *Taylor, Appellant; Nixon, Respondent* K.B. 94

WILL—Charitable bequest—Legacy to Irish Church Missions - - - 251
See CHARITY.

— Clear gift not cut down by subsequent ambiguous words - - - 465
See ABSOLUTE GIFT.

WILL, TENANCY AT—Specially indorsed writ - - - 194
See SPECIALLY INDORSED WRIT.

WORDS—“Accident”—Workman’s Compensation Act, 1906 - - - 105
See WORKMAN. 1.

— “Full compensation”—Public Health Act, 1878, s. 274 - - - 285
See ARBITRATION. 2.

— “Other work”—6 & 7 Wm. 4, c. 116, s. 135 - - - 25
See MALICIOUS INJURY. 2.

— “Services in lieu of rent”—Claim - 1
See PARLIAMENT. 3.

— “Sole and exclusive use”—41 & 42 Vict. c. 26, s. 5 - - - 207
See PARLIAMENT. 1.

— “Specially qualified”—41 & 42 Vict. c. 33, s. 3 - - - 220
See DENTIST.

— “Structural separation”—6 Edw. 7, c. 39, s. 2 - - - 200
See PUBLIC-HOUSE.

— “To commence from the death of the last life in said indenture of lease”—Lease
See LEASE. [112, 124]

— “Watercourse”—Lease - - - 334, 363
See WATERCOURSE.

— “Wilfully”—62 & 63 Vict. c. 51, s. 16 94
See WILFUL OBSTRUCTION.

WORKMAN—*Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58)*—*Accident*—*Death supervening upon sudden chill in course of employment.*] A workman employed in cleaning a millrace caught a sudden chill, caused by immersion in the water. Acute inflammation of the kidneys supervened, and he died within eight days. The medical evidence proved that the attack could only have been brought on, and death result, by the exposure to cold water, and in no other way:—*Held*, that the case could not be distinguished from *Ismay, Imrie, & Co. v. Williamson* ([1908] A. C. 437), and that the death was caused by an accident within the meaning of the Workmen’s Compensation Act, 1906. *Sheerin, Applicant; Clayton & Co., Respondents* [App. 105]

WORKMAN—continued.

2.— *Workmen's Compensation Act, 1896, Schedule I., s. 1 (a), (i., ii.)—Dependant in part on workman's earnings—Mode of assessing compensation.* *A.* died as the result of an accident arising out of and in the course of his employment with the respondents, with whom he had worked for a period of six weeks, earning £1 5s. a week, with the prospect of a bonus. For a period of three years prior to his entering the respondents' employment *A.* had been employed elsewhere at 10s. a week, during which period he resided with his father, the applicant, to whom he paid his wages, and who supported *A.* out of such wages at a cost of 7s. a week. During his employment with the respondents *A.* resided alone, and supported himself at a cost of 12s. a week, but at the end of three weeks he paid the applicant the sum of £1 10s., and the latter, after *A.*'s death, received from the respondents the sum of £2 10s., the balance of *A.*'s wages then due. On the hearing of an application for arbitration under the Workmen's Compensation Act, 1906, the County Court Judge awarded the applicant compensation as a partial dependant, calculated at 3s. a week for 150 weeks in respect of *A.*'s former employment, deducting from *A.*'s wages of 10s., 3s. for cost of his maintenance, and 10s. a week in respect of his employment with the respondents. *Held*, by the Court of Appeal (The Lord Chancellor and Holmes, L.J., Cherry, L.J., dissenting), that the County Court Judge, in estimating compensation to the dependant, "reasonable and proportionate to the injury," was entitled to take into consideration the amount of *A.*'s former earnings, and the proportion thereof expended on his maintenance, and that, as it was not shown that he had misdirected himself, the award should be allowed to stand. *Osmond v. Campbell and Harrison, Ltd.* ([1905] 2 K.B. 852), considered. *O'Neill, Applicant; Bansa Co-operative & Co., Society, Respondents* - - - APP. 324.

3.— *Workmen's Compensation Act, 1906, s. 1 (1)—Factory rules—Authority of overseer—Reasonable action of employee pursuant to specific order—Course of employment.* *A.* boy employed in the respondents' boot factory was engaged at his ordinary work upon a machine in the finishing-room on the upper story. By the factory regulations the hands were forbidden to change from one machine to another. An imperfectly moulded in-sole was brought up amongst others to the finishing-room from the ground-floor. An overseer directed him to bring the in-sole downstairs and have it remoulded. The boy had not been expressly

WORKMAN—continued.

forbidden to touch the moulding machine. The operator in charge of this machine was temporarily absent, and the boy did not wait for his return, but attempted to remould the sole himself, and in doing so, received injuries which resulted in the loss of three fingers. On an application for compensation the County Court Judge found that the accident did not arise out of and in the course of his employment. *Held*, that there was no evidence upon which the learned Judge was justified in so finding; and that the applicant was, therefore, entitled to compensation under the Workmen's Compensation Act. *Tobin, Applicant; Hearn and another, Respondents* - - - APP. 639

4.— *Workmen's Compensation Act, 1906, s. 1, sub-s. 1—Gamekeeper—Injuries resulting from attack of poachers.* *A.* gamekeeper, whilst engaged in the discharge of his duties, was attacked and beaten by poachers, as a result of which he was injured. *Held* (by the Lord Chancellor and Holmes, L.J., Cherry, L.J., dissenting), that this was a case of personal injury by accident within the meaning of the Workmen's Compensation Act, 1906. *Anderson, Applicant; Balfour, Respondent* - - - APP. 497

5.— *Workmen's Compensation Act, 1906, s. 1, sub-s. 1—Night watchman on board ship—Accidental drowning—Absence of direct evidence of circumstances under which accident occurred—Burden of proof—Finding on question of fact—Function of Appellate Court.* In a claim for compensation under the Workmen's Compensation Act the burden of proving that the accident arose both out of and in the course of the employment rests on the applicant, even when claiming as dependant on a deceased workman; and the County Court Judge's decision on questions of fact is conclusive, at least where upon the facts proved or admitted there are circumstances from which he could reasonably draw the inference on which his conclusion is based. Accordingly, where the evidence is as much consistent with the accident having arisen out of and in the course of the workman's employment as with the contrary, and the County Court Judge draws the inference that it did not so arise, and dismisses the application, the Court of Appeal cannot interfere with his decision. The authorities on these points in England and Scotland considered. *Gallon, Applicant; Limerick SS. Co., Respondents* [APP. 561]

WRIT—Special indorsement - - - 194
See SPECIALLY INDORSED WRIT.

THE END.



